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LEGAL SYSTEM OF BANGLADESH

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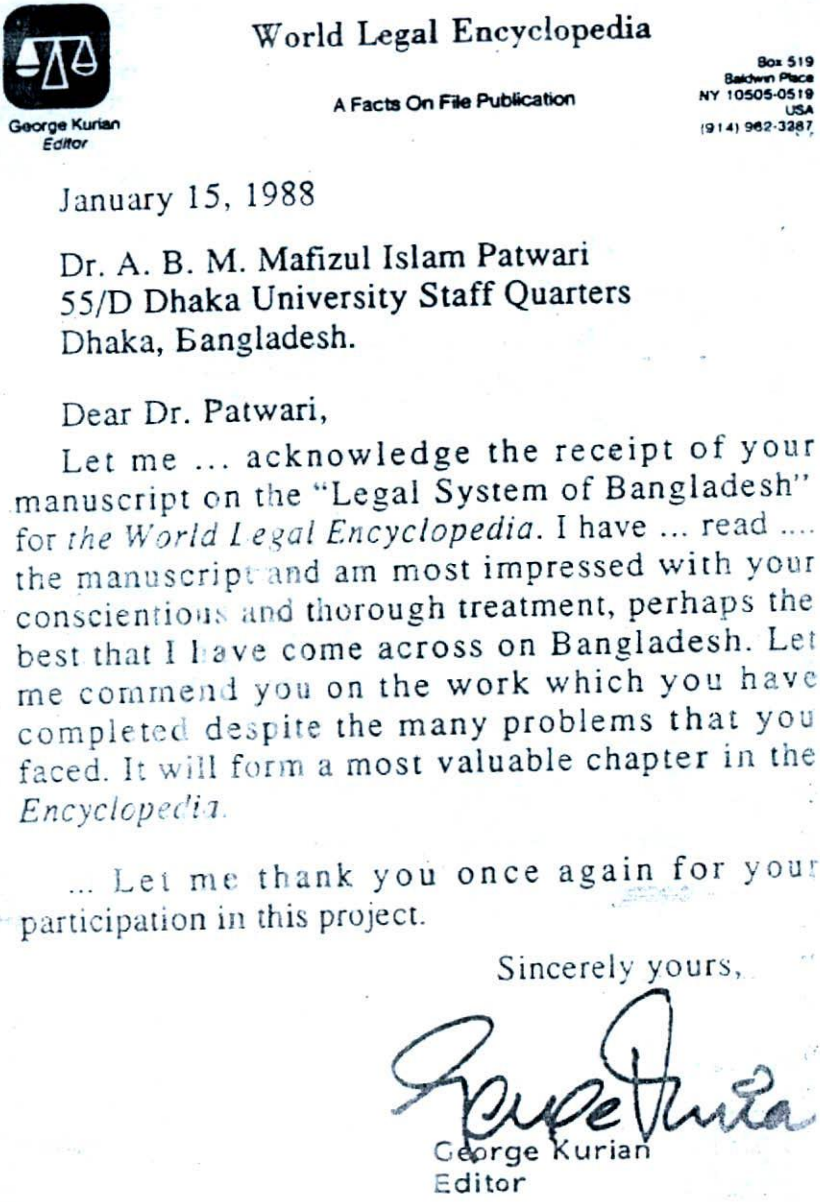
LEGAL SYSTEM OF BANGLADESH

DEDICATION

IN MEMORY OF
MARTYRS OF WAR OF INDEPENFDENCE 1971

Dhaka, March 26, 1991 DR. A. B. M. MAFIZUL ISLAM PATWARI



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January 15, 1988

Dr. A. B. M. Mafizul Islam Patwari
55/D Dhaka University Staff Quarters
Dhaka, Bangladesh.

Dear Dr. Patwari,

Let me ... acknowledge the receipt of your manuscript on the "Legal System of Bangladesh" for *the World Legal Encyclopedia*. I have ... read .... the manuscript and am most impressed with your conscientious and thorough treatment, perhaps the best that I have come across on Bangladesh. Let me commend you on the work which you have completed despite the many problems that you faced. It will form a most valuable chapter in the *Encyclopedia*.

... Let me thank you once again for your participation in this project.

Sincerely yours,

George Kurian
Editor

United States Court of App
125 South Grand Avenue — Suite 303
Pasadena, California 91105

Dorothy W. Nelson, Judge

FOREWORD

Dr. A. B. M. Mafizul Islam Patwari has performed a great service for those of us who struggle to obtain well researched and accurate data on the legal systems of the world. His comprehensive and thorough treatment of the legal system of Bangladesh is an outstanding contribution to the literature of legal systems and so far as I know, the only one of its kind on Bangladesh.

His learned discussion of the historical perspective is an excellent background for his coverge of civil, commercial, criminal, personal, and agrarian laws. He has two excellent chapters on education and the profession and recent legal developments.

Of particular interest to me and to judges from around the world is his section on the Independence of the Judiciary. This was a topic we studied together at the International Institute of Human

Rights in Strasbourg, France, in July of 1989. The relationship between the independence of judges and lawyers and the domestic protection of human rights is recognized in key United Nations human rights instruments. Where judges and lawyers are not independent, there are no effective domestic defenses against or remedies for human rights violations. Dr. Patwari indicates that in Bangladesh the independence of the judiciary is claimed to be ensured, but if the matter is looked into deeply, it is clear that the independence of the judiciary has been curtailed by the provisions of the Constitution as amended by the Fourth Amendment.

Legal System of Bangladesh is a ready guide for scholars, judges, lawyers and laypersons. With increasiong awareness that we are all in this world together, we benefit greatly when a book of this kind tells us so much about a legal system unfamiliar to many. It is an indispensable addition to comparative legal literature. It is my hope that a broad audience, worldwide, will agree.

Patwari's excellent book makes a real contribution to legal scholarship.

Dorothy W. Nelson

Dorothy W. Nelson

PREFACE

As there was no authentic book on the legal system of Bangladesh, I felt it obliged to write one in which a reader, at home and abroad, will get a brief but clear idea of all the aspects of the legal system of Bangladesh. The publication of this book by the Humanist and Ethical Association of Bangladesh, is the fulfilment of my commitment to my nation as well as to the international community both of which were in need of a work of this kind for a long time. The acknowledgement sent by Mr. George Kurian, Editor, *World Legal Encyclopedia*, New York, United States of America, and the foreword written by Justice Dorothy W. Nelson, Judge, United States Court of Appeals, California, United States of America, bear the testimony of this statement. I am really grateful to Mr. George Kurian for accepting me as a co-author of the *World Legal Encyclopedia* and to Justice Dorothy W. Nelson for writing the foreword of the book which, I sincerely believe, has increased the value and credibility of the work. I am also grateful to Professor Zaharul Islam Choudhury, Dean, Faculty of Law, University of Dhaka, Bangladesh, for introducing me to George Kurian in connection with my participation in the project of writing the *World Legal Encyclopedia*.

In the present work almost all the aspects of legal system of Bangladesh have been briefly introduced. In Bangladesh at present common law prevails. But the effect of Indo-Mughal legal system is also evident. It takes this present shape after a long historical process of development. All the courses of the development have been discussed.

The major aspects of constitutional law, the fundamental law from which all laws derive authenticity, have been discussed. The basic structures and functions of the executive, legislature and judiciary—three organs of a modern State—have been discussed in pursuance of the privisions of the Constitution of Bangladesh, 1972. Besides, independence of judiciary and fundamental rights guaranteed by the Constitution have been discussed in some length.

Moveover, some basic civils laws along with civil procedure have been introduced. Hindu and Muslim personal laws relating to marriage, divorce, guardianship, paternity have been presented along with their sources and schools. Main provisions relating to land laws as contained in the State Acquisition and Tenancy Act, 1950, and Non-Agricultural Tenancy Act, 1949, have been pointed out. Major aspects of commercial law, criminal law, and law of evidence are also the subjects of discussion.

Besides these, two important topics such as legal education, legal profession and Institutions and recent legal development have been discussed in a manner and style which are commended by some eminent jurists of the world. I am really grateful to them for their appreciation.

However, before closing discussion I must mention that I awe my gratefulness to Chalantika Computers for word processing and Al-Amin Printers for printing the work. I am also thankful to Executive Committee of the Humanist and Ethical Association of Bangladesh for publishing the book.

Dhaka, March 26,1991 A. B. M. Mafizul Islam Patwari

ABBREVIATIONS

A. C.	Appeal Cases
A. I. R.	All India Reporter
All.	Allahabad Law Reports
B.L.R.	Bengal Law Reports
Bom.	Bombay Law Reports
C.	Chapter
Cal.	Calcutta Law Reports
C.A.	Court of Appeal
Ch.D.	Chancery Division
Co.	Company
C.W.N	Calcutta Weekly Notes
D.L.R.	Dhaka Law Reports
Geo.	George
I.A.	Indian Appeals
I.C.	Indian Cases
I.L.R.	Indian Law Reports
Ind. Dec.	Indian Decisions
J.	Judge
Mad.	Madras Law Reports
M.I.A.	Moores Indian Appeals
M. W. N.	Madras Weekly Notes
P.C.	Privy Council
P.L.D.	All Pakistan Legal Decisions
S.C.	Supreme Court
W.R.	Weekly Reports
Will.	William

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CHAPTER I

HISTORICAL BACKGROUND

1. INTRODUCTORY REMARKS

[illegible] মন্তব্য করা

Bangladesh which emerged as an independent and sovereign State on the 16th December, 1971, has a long political and legal history. In the ancient times it was ruled by the local Hindu rulers who administered justice according to local customery laws based on religion. At the beginning of the 13th century it was invaded by the Muslims who ruled the country up to the middle of the 18th century. They introduced Islamic administration of justice in which reflection of the legal system of the Hindu period could not be ignored. Though the British came to Indian Sub-continent at the beginning of the 17th century, they were able to establish political sovereignty over Bengal and ultimately over the whole of Indian Sub-continent at the middle of the 18th century. They infiltrated their legal system and replaced the earlier one in course of time. The British left the Sub-continent in 1947 giving independence to colony of India by dividing it into two independent dominions, India and Pakistan. On independence in 1947, Bangladesh which was previously a part of province of Bengal became a province of Pakistan named as East Pakistan and was ruled by the Pakistani neo-colonial rulers up to 1971 when it emerged as a sovereign State.

So, the roots of the development of legal system of Bangladesh go back to the ancient times of Indian Sub-continent. It passesd through various stages and has gradually developed as a continuous historical process. The process of the development can be conveniently divided into the four important periods——Hindu period, the Muslim period, the British period and the Modern period. The Hindu period extended for nearly 1600 years before and after the beginning of the Christian era. Muslim period began with the first major invasion by Muslims in Indian Sub-continent in 1100 A.D. The British period began with the consolidation of their power in 1757 A.D. in India, and lasted for nearly two hundred years. The Modern period has began with the withdrawl of the British colonial rule from the Indian Sub-continent and the establishment of the independent States of India and Pakistan in 1947.[1]

2. HINDU PERIOD

In ancient Bangladesh as well as in India the king was regarded as the fountain-head of justice. His foremost duty was to protect his subjects. He was respected as the lord of religion and was entrusted with the supreme authority of the administration of justice in his kingdom. The King's Court was the highest Court of appeal. It was also the original Court in the cases of vital importance to the kingdom.

Next to the King was the Court of the Chief Justice. Apart from the Chief Justice, the Court consisted of a board of Judges to assist him. In the district headquarters the courts were presided over by the government officers under the authority of the King for the administration of justice. In the villages there existed *panchaets* (councils) consisted of a board of five or more members to dispense justice to the villagers. The village *panchaets* dealt with simple civil and criminal cases.

In ancient Bangladesh the law which was administered was customary. Canon law was also recognised. Besides, *dicta* emanating from religion was regarded as a major source of law. This system remained operative in the country with some modifications here and there until the advent of Islam in Indian Sub-continent.

3. MUSLIM PERIOD

Muslim period marked the beginning of a new era in the legal history of Bangladesh. The Arab Muslim first came to India in the eighth century but it did not create any impression in the minds of the people of this Sub-continent. But during the continuance of the *sultanate*, 1206 A.D.—1526 A.D., the administration of justice was taking formative shape, and during the Mughal period commencing from 1526 A.D. a well-organised legal system took a positive shape.

During the Mughal period the Emperor was considered the fountain of justice. The Emperor created a separate department of justice with a view to regulating and observing the proper adminsitration of justice. A systematic gradation of courts with well-defined powers of the presiding Judges existed all over the empire. They were as follows:

At Delhi, the capital of the Mughal empire, three important courts were established : the Emperor's Court, the Chief Court of the empire and the Chief Revenue Court. The Emperor's Court, presided over by the Emperor, was the highest Court of the empire. The Court had original and appellate jurisdictions to hear civil and criminal cases. The Chief Court of the empire, presided over by the *Qazi-ul-Quzat* (Chief Justice) who was appointed by the Emperor, was the second important Court at Delhi, the seat of the Capital. The Court had the original and appellate jurisdictions to hear civil and criminal cases. It also supervised the working of the provincial courts. The Chief Revenue Court, presided over by the *Diwan-e-Ala* was the third imprtant Court established at Delhi. it was the highest Court of appeal to decide revenue cases.

In each Province (*Subah*) there were three courts, namely, the Governor's Court and the Bench, the Chief Appellate Court and the Chief Revenue Court. The Governor's own Court (*Adalat-e-Nazim-e-Subah)*, presided over by the Governor (*Nazim-e-Subah)*, had original jurisdiction to hear cases arising in provincial capital. Sometimes the Governor presided over a Bench to hear original, appellate and revisional cases. The Provincial Chief Appellate Court was presided over by the *Qazi-e-Subah*. The Court had original and criminal juridiction.

In each district *(Sarkar)* there were four courts, namely, the Chief Civil and Criminal Court of the district, *Faujdari Adalat*, Court of *Kotwali* and *Amalguzari Kachehri*. In each *parganah* there were three courts, *Adalat-e-paragana*, Court of *Kotwali* and *Kachehri*. At the village level the Mughal retained the ancient system of the *panchaets* for the settlement of petty disputes. *Sarpanch*, the village-headman, was the President of the *panchaet*.

This system of law under the Mughals was effective and worked well for some centuries. Its disintegration started when the control of the Mughal Emperors over the provinces became less effective. Another cause of this disintegration was the coming of the English and the infiltration of their legal system into the country. The acquisition of sovereignty over India was slowly made by imperciptible steps and "the sudden application of a foreign law was in the highest degree, improbable".[2] But ultimately the English established their sovereignty over Indian Sub-continent and made an expansion of the comon law in India..

4. BRITISH PERIOD

The English first came to India as trading companies under a series of Charters granted by successive English sovereigns. The earliest was of Eliabeth I in 1600 A.D. It gave the company power to make reasonable bye-laws, ordinances for the good government of the Company and its servants provided they were not contrary to "the laws, statutes or customs of the English realm." Sir James Stephen thought that this first introduced the laws of England into india.[3]

In 1726 A.D. the Crown granted Letters Patent creating Mayors' Courts in the Presidency Towns of Calcutta, Bombay and Madras.[4] These were not the Company's Courts but Courts of the King of England. These Courts consisted of the Mayors and certain aldermen and were authorised "to try, hear and determine all civil suits, actions and pleas" and "to give judgment and sentence according to justice and rights". The Charter creating the Mayor's Courts did not expressly state that the law to be applied by these Courts was to be the law of England. But the decision of the Privy Council was that the Charter introduced into the Presidency Towns the law of England - both common law and statute law - as it stood in 1726.[5] Morley differing from the view expressed by Sir James Stephen also reached the similar conclusion. [6]

In course of time the activities of the companies were not confined to the factories; and their officers gradually assumed the management of affairs in the interior of the country as well. They defeated the *Nawab* of Bengal in 1757 A. D. and established the political supremacy in Bengal, Bihar and Orissa. In 1765 A. D. Clive successfully persuaded Mughal Emperior Shah Alam to grant to the Company *Diwani* for the collection and administration of revenue of Bengal, Bihar and Orissa. "This involved the establishment, not only of officers to collect the revenue, but also of courts to administer civil and criminal justice."[7] Professor Alan Gledhill regarded it as the "*de jure* recognition" of supreme control of the British. [8]

After the acquisition of *Diwani* in 1765 A. D. the Company introduced *adalat* or court system in 1772 A. D. for the administration of justice in *Mufassil* beyond the Presidency Town of Calcutta and set up two types of courts in each revenue district. For civil justices, Provincial Civil Court styled *Mufassil Diwani Adalat* was established in each collectorate and a Chief Civil Court styled *Sadar Diwani Adalat* with appellate power was established in Calcutta. A Supreme Court of Judicature replacing the Mayor's Court was established in Calcutta by a Charter of the 26th March, 1774. A. D. pursuant to the Regulating Act of 1773[9] A. D. passed by British Parliament. It had jurisdiction of a common law court and also the powers of the court of equity analogous to those exercised at one time by the Court of Chancery in Britain.

In 1862 A. D. the High Court of Calcutta was established pursuant to the provisions of the High Courts Act, 1861[10]. This High Court replaced the Supreme Court and Chief Civil Court or *Sadar Diwani Adalat*. All the original and appellate jurisdictions of the Supreme Court, the appellate jurisdiction of *Sadar Dewani Adalat* and *Sadar Nizamat Adalat* became vested in the said High Court. Provision for appeal from the High Court to the Privy Council was made under certain circumstances. The provisions of the High Courts Act, 1861, were modified by the Indian High Courts Act, 1911[11]. The Government of India Act, 1915.[12] re-enacted all provisions made by the Indian High Courts Acts of 1861 and 1911 in relation to the High Courts. The Government of India Act, 1935,[13] retained many provisions regulating the establishment, constitution, jurisdiction and powers of the High Courts.

The Government of India Act, 1935, also provided for the establishment of a Federal Court which was given exclusive original jurisdiction to decide cases between the Centre and the constituent Units. Its advisory jurisdiction was limited only to those cases which were referred to it by the Governor-General for its advice on any legal question of public importance. It also exercised appellate jurisdiction from the decisions of the High Courts but it was a very limited one. The Act made provision for an appeal to the Privy Council from the Federal Court.

This judicial system continued upto 1947 A.D. when two independent dominions, India and Pakistan, were created under the Indian Independence Act, 1947.[14]

Before closing the discussion on the legal system under the British period a brief discussion on the codification of law should be made. The legal system prevailing in Indian Sub-continent near about the beginning of the 19th century was full of confusion and chaos. Law in all the Presidency Towns was not uniform. Judicial decisions introduced some differences therein. There was uncertainty whether a particular proposition of law was applicable or not either in the *Mofussil* or in the Presidency Towns till the highest court had given a verdict. The non-Hindu and non-Muslim sections of population were subject to different laws as according as they resided in the *Mofussil* or the Presidency Towns, and this caused them great inconvenience.[15]

The condition of law at that period provoked comments and criticisms from many leading people who put emphasis on the codification of law.[16] The creation of an All India Legislative

Council in 1833 under the Charter Act of 1833[17] and creation of Law Commissions of 1835, 1853, 1861, and 1879, were the direct reflections of these comments and criticisms,[18] and the promulgation of the Indian Panal Code, 1860 (Act XLV of 1860), marked "the beginning of the period of codification of substantive law".[19] In 1872 the famous Indian Evidence Act (Act I of 1872) and Indian Contract Act (Act IX of 1872) were passed. All these Acts were based on the common law of England and made remarkably few departures from it.[20] Within a few years a number of Acts were passed which provided the laws according to the provisions of which administration of justice was maintained.

In this way "..... the English brought into India not only the mass of legal rules strictly known as the common law but also their traditions, outlooks and techniques in establishing, maintaining and developing the judicial system"[21]the far reaching impact of which will not be removed in the near future.

5. MODERN PERIOD

After independence of Indian Sub-continent in 1947 A. D. Bangladesh became a province of Pakistan which was run in accordance with the provisions of the Government of India Act, 1935, read with the Indian Independence Act, 1947. Under the new constitutional arrangement, a new Federal Court of Pakistan was set up at Karachi.[22] The Federal Court (Enlargement of Jurisdiction) Act, 1950, provided that civil appeals which previously lay to the Privy Council would lie to the Federal Court and the Privy Couuncil (Abolition of Jurisdiction) Act, 1950,[23] transfarred on the 22nd April, 1950, to the Federal Court all the appellate jurisdiction of the Privy Council in respect of Pakistan. To exercise powers and jurisdictions over the territory comprising the then province of East Bengal a new High Court for East Bengal was set up at Dhaka in 1947.[24] This High Court had exercised same power and authority in the administration of justice as the High Court of Calcutta did. After the emergence of Bangladesh the High Court of East Pakistan was replaced by the High Court of Bangladesh[25] and later on by the Supreme Court of Bangladesh under the Constitution of Bangladesh, 1972. The Supreme Court of Bangladesh administers justice according to those laws which were in force in Bangladesh on the 25th March, 1971,[26] subject to the provisions of the Constitution of Bangladesh and the consequential changes made by the competent authority.

From the above discussion it is revealed that the present legal system of Bangladesh is not an outcome of a revolution but evolution starting from an undated ancient Hindu period. It passed through the Muslim period for some centuries and took a positive shape at the later part of the British period. So, it emanates from a mixed system of Indo-Mughal and English law, both comon law and equity,—the English law predominating. After the end of the British rule in 1947, though sovereigny and independence of the people of this region have been established but no change in the basic structure of the legal system as established by the British has yet been made.

NOTES AND REFERENCES

1. See V.D. Kulshreshth, *Landmarks in Indian Legal and Constitutional History* (Lucknow: Eastern Book Company, 1981) at p. 1.
2. *Mayor of Lyons* v. *East Indian Co.*, (1836)1 M.I.A. 175, per Lord Brougham at p. 277.

3. See Justice Vivian Bose. "the Migration of the Common Law" *The Law Quarterly Review*, Vol. 76 (1960) p. 59.
4. Letters Patent of 24th September, 1726, the 13th year of the reign of George I.
5. See *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee*, (1863) 9 M.I.A. 424.
6. See Justice Vivian Bose, *op. cit.*, at p. 60.
7. *Ibid.*
8. Alan Gledhill, *Pakistan: the Development of Its Laws and Constitution* (London: Stevens and Sons. 1967) at p. 17.
9. 13 Geo. III, C. 63.
10. 24 & 25 Vict. C. 104.
11. 1 & 2 Geo. V. C. 18.
12. 5& 6 Geo. V. C. 61.
13. 26 Geo. V. C. 2.
14. 10 & 11 Geo. VI. C. 30.
15. *Hansard's Debates, Third Series*, Vol. XVIII, 729 (1833). See also *Musleah v. Musleah*, Ind. Dec. (OS) III, 147.
16. See M.P. Jain, *Outlines of Indian Legal History* (Bombay: N.M. Tripathi Private Ltd., 1972) at pp. 500-505.
17. 3 & 4 Will. IV C. 85.
18. M.P. Jain, *op.cit.*, at pp. 511-551.
19. *Ibid.*, at p. 551.
20. Justice Vivian Bose, *op. cit.*, at p.60.
21. M.C. Setalvad, (London: Stevens and Sons Limited, 1960) at p. 3.
22. The Federal Court Order, 1947 (G.G.O. 3 of 1947). See *Constitutional Documents(Pakistan)* Vol. IV-B, (Karachi : Government of Pakistan Press, 1964) p.919.

23. See *Constitutional Documents (Pakistan) Vol. III*, p. 73.
24. The High Court (Bengal) Order, 1947 (Order 4 of 1947). For the text see *Constitutional Documents(Pakistan), Vol. IV-B*, p.915.
25. *See High Court of Bangladesh Order*, 1972 (P.O. 5 of 1972). For the text see *Bangladesh Gazette Extra.*, January 17, 1972.
26. See Proclamation.of Independence, 1971, read with Laws Continuance Enforcement Order, 1971. For the texts see 24 D.L.R. (1972) Bangladesh Statutes (1971-1972) pp. 1-3.

CHAPTER II

BASIS CONSTITUTIONAL LAW

1. EXECUTIVE

On the emergence of Bangladesh constitutional arrangement was contained in the Proclamation of Independence[1] which came into force on the 26th March, 1971. This arrangement continued till the 10th January, 1972. On the 11th January, 1972, the President piomulgated the Provisional Constitution of Bangladesh Order, 1972,[2] which became the interim constitution of the country. However, The Government of Bangladesh had in its mind to frame a constitution. The Constitution Drafting Committee prepared a draft constitution[3] which was finally adopted and enacted by the Constituent Assembly. The Constitution of the People's Republic of Bangladesh[4] came into force on the 16th December, 1972.

The Constitution of Bangladesh under Article 7 guaranteed the supremacy of the Constitution over all the laws of the country and introduced westminster model of parliamentary democracy. The Constitution since 1972 was amended for ten times and was suspended for two times due to declarations of Martial Law one in 1975 and the other in 1982. The Fourth Amendment of the Constitution[5] has made a radical change in the basic structure of the Constitution and introduce the presidential system of democracy which is now prevailing in Bangladesh. In the following pages the discussion is made on the basis of the Fourth Amendment of the Constitution subject to changes made later on by any other amendments.

Part IV of the Constitution deals with "the Executive." Chapter 1 of this Part ensures that the executive authority of the Republic shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him[6].

The President shall be elected by direct election[7] and hold office for a term of five years from the date on which he enters upon his office.[8] The President shall make rules for the allocation and transaction of the business of the Government.[9] He shall have power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.[10] The supreme command of the defence services of Bangladesh shall vest in the President.[11]

Under the Constitution provision has been made to have a Vice-President to be elected by direct election.[12] The term of the Vice-President is for five years but he can " continue to hold office until his successor enters upon his office"[13] The Vice-President is to exercise such powers as are assigned to him by the President. [14] He can function as Acting President if any vacancy occurs in the office of the President or the President is unable to discharge the function of his office on account of absence or illness or any other cause.[15]

Chapter II of Part IV of the Constitution deals with "the Council of Ministers". For the original arrangement of a cabinat system with the Prime Minister at its head, a Council of Ministers has been substituted to "aid and advise the President in the exercise of his function."[16] Under the new arrangement the Ministers, including the Prime Minsiter, are to be appointed by the President and shall hold office during his pleasure.[17]

The original Constitution of 1972 made the President titular Head of the State; but the Fourth Amendment has made him head of the State as well as head of the Government The Vice-

President, the Prime Minsiter and all other Ministers are subordinate to him who hold office during the pleasure of the President. In short, the Fourth Amendment has made the President constitutional dictator.

2. LEGISLATURE

Part V of the Constitution deals with "the Legislature". Chapter I of this Part of the Constitution provides that the legislative powers of the Republic shall be vested in Parliament to be known as "the House of the Nations."[18] Parliament consists of 330 members of whom 300 members will be elected in accordance with law from single territorial constituencies by direct elections.[19] There shall be reserved 30 seats exclusively for women members who shall be elected according to law by the members aforesaid.[20] The seat of Parliament shall be in the Capital.[21]

Parliament shall be summoned, prorogued and dissolved by the President.[22] There shall be at least two sessions of Parliament in every year.[23] the normal term of Parliament is for five years.[24]

Parliment shall at the first sitting after any general election elect from among its members a Speaker and a Deputy Speaker, and if either office becomes vacant shall within seven days or, if Parliamnet is not then sitting, at its first meeting thereafter, elect one of its members to fill the vacancy.[25]

Chapter II of Part V of the Constitution deals with legislative and financial procedures. Every proposal in Parliament for making a law shall be made in the form of a Bill.[26] When a Bill is passed by Parliament it shall be presented to the President for assent.[27] When the President has assented or is deemed to have assented to a Bill passed by Parliament it shall become law and shall be called an Act of Parliamet.[28] No tax shall be levied or collected except by or under the authority of an Act of Parliament.[29]

Chapter III of Part V of the Constitution deals with the Ordinance making power of the President. The Constitution provides that at any time when Parliament is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make or promulgate such Ordinances as the circumstances appear to him to require.[30] Any Ordinances to made shall have the like force of law as an Act of Parliament.[31] But such an Ordinance shall not make any provision - which could not lawfully be made under the Constitution by Act of Parliament; for altering or repealing any provision of this Constitution; or continuing in force any provision of an Ordinance previously made. [32]

From this short discussion it is evident that the established ingredients of the westminster model of parliamentary system are absent in the Constitution as amended by the Fourth Amendment. The executive is no longer responsible to the legislature; thus, the check and balance maintained in the original Constitution has been destroyed. On this point Moudud Ahmed observes: "with these amendments the importance of the Parliament was entirely gone and it was turned into a secondary rubber-stamp body in the new political system."[33] Latter political crises prove this statement to be correct one.

3. JUDICIARY

part VI of the Constitution deals with "the Judiciary". Chapter I of this Part provides that there shall be a Supreme Court of Bangladesh which is the highest Court of Bangladesh comprising two Divisions: the Appellate Division and the High Court Division.[34] The Supreme Court shall consist of the Chief Justice and such number of other Judges as the President may deem it necessaery to appoint to each Division.[35] The Chief Justice and other Judges, who hold office until they attain the age of sixty-five years unless removed earlier by the order of the President on the ground of misbehaviour or incapacity, shall be appointed by the President.[36]

The High Court Division of the Supreme Court shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law.[37] The said Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any fundamental rights conferred by Part III of this Constitution.[38] In other words this Division is empowered to issue writs of *habeas corpua, mandamus, Quo warranto, certiorari* and prohibition. This Division shall have superitendence and control over all courts subordinate to it, and the law declared by that Division shall be binding on all courts subordinate to it.[39]

The Appellate Division of the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.[40] The said Division has the power to review any judgment pronounced or order made by it.[41] If at any time it appears to the President that question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearing as it thinks fit, report its opinion thereon to the President.[42] The law declared by the Appellate Division shall be binding on the High Court Division and all other courts subordinate to it.[43]

Chapter II of Part VI of the Constitution deals with "Subordinate Courts." The Constitition provides that in addition to the Supreme Court there shall be such courts subordinate to it as may be established by law.[44]

Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.[45] The control including that power of posting, promotion and grant of leave and discipline of persons shall vest in the President.[46]

Chapter III of Part VI of the Constition provides that Parliament may by law establish one or more "Administrative Tribunals." the Constitution provides that Parliament may by law establish one or more administrative tribunal to exercise jurisdictions in respect of matters relating to or arising out of --- the terms and conditins of persons in the service of the Republic: the acquisition, administration, management and disposal of any property vested in or managed by the Governemnt by or under any law, including the operation and management of , and service in, any nationalised enterprise or statutory public authority etc.[47] Where any administrative tribunal is established under Article 117 of the Constitution, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal, Provision was made that Parliament may, by law, provide for appeals from, or the review of , decisions of any tribunal. [48]

In this way, the structure of the Judiciary has been framed by the Constitution of Bangladesh.

4. INDEPENDENCE OF JUDICIARY

Before making an observation on the independence of judiciary provided by the Constitution as amended by the Fourth Amendment, a short diacusation on its background should be made with view to giving the proper perspective of the study.

The original Constitution of Bangladesh ensured the independence of judiciary. The Supreme Court of Bangladesh in deciding a number of cases [49] took a valiant stand and tried to establish the rule of law as contemplated within the structure of the Constitution. "This sort of rulings was a great shock on the part of the executive authority of Bangladesh"[50] and the Government of Bangladesh had determined to curtial the powers and jurisdictions of the Supreme Court in particular and judiciary in general as guaranteed by the Constitution of Bangladesh, 1972. And the curtalment of the independence of judiciary as made by the Fourth Amendment was the direct consequence of this sort of determination taken by the existing Governemnt.

Thus, it has been laid down in the Constitution that "subject to the provisions of this Constitution the Chief Justice and other Judges of the Supreme Court of Bangladesh shall be independent in the exercise of their judicial functions."[51] It has also been laid down that "subject to the provisions of the Constitution, all persons employed in the judicial service and magistrates shall be independent in the exercise of their judicial functions."[52] This means that the persons who are employed in the judiciary are independent in the exercise of their judicial functions. In other words, independence of judiciary is ensured. But if the matter is looked into deeply it will be clear that the independence of judiciary has been curtailed by the provisions of the Constitution as amended by the Fourth Amendment.

First, on the question of removal of judges the provision for impeachment was deleted and the same power has been assumed by the President who can remove a Judge including the Chief Justice simply by an order on the ground of misbehaviour or incapacity. secondly, with regard to the appointment of additional judges of the Supreme Court, the President may make the appointment without any consultation with the Chief Justice. Thirdly, in matters of appointment to the subordinate courts the authority of the Supreme Court has been withdrawn. Fourthly, the Supreme Court has no authority for the control and discipline of the subordinate courts. Fifthly, the power of superintendence and control of the High Court Division over all tribunals subordinate to it has been withdrawn. in these ways, the independence of judiciary withing the framework of the Constitution of Bangladesh as amended by the Fourth Amendment has been curtailed.

Moreover, since 1972 Martial Law had been declared two times, one in 1975 which continued upto 1979 and another in 1982 which continued upto 1986 — the direct consequence of which was that the powers and jurisdictions of the Supreme Court as provided by the Constitution were curtailed so that the said Court could not call in question the Proclamations of Martial Law, Martial Law Regulations, Martial law Orders, or any other order made by the Chief Martial Law Administrator or any person authorised by him. Thus, during the continuance of the Martial law the Judiciary was made the subordinate organ of the executive authority i.e., the Martial Law authority, and accordingly, the residue of the independence of judiciary has been abolished.

5. FUNDAMENTAL RIGHTS

Part III of.the Constitution deals with "Fundamental Rights." The Constitution guarantees that all existing laws inconsistent with fundamental rights and any law so made shall, to the extent of such inconsistency, become void on the commencement of the Constitution.[53] It also guarantees that the State shall not make any law inconsistesnt with fundamental rights and any law so made shall, to the extent of such inconsistency, be void.[54]

Articles 27 to 43 of the Constitution guarantee some fundamental rights which may be classified under the following heads: (A) equality of persons; (B) protection of life, liberty and property; and (C) political and religious freedoms.

(A) Equality of persons :- the Constitution ensures that all citizens are equal before law and are entitled to equal protection of law[55] To enjoy the protection of the law,and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen.[56] The Constitution provides that there shall be equality of opportunity for all citizens in respect of employment or office in the sevice of the Republic.[57]

(B) protection of life, liberty and property:-The Constitution guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.[58] It also guarantees that no person shall be deprived of life or personal liberty save in accordance with law.[59] The Constitution further provides protection against retrospective offence or punishment.[60]

The Contitution ensures to every citizen certain safeguards against arbitrary arrest and detention.[61] No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.[62] All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.[63] The Constitution provides that every citizen shall have the right, subject to any reasonable restriations imposed by law. to be secured in his home against entry. search and seizure, to the privacy of his correspondence and other means of communication.[64]

Subjuct to any restrictions imposed by law. every citizen shall have the right to acquire. hold. transfer or otherwise dispose of property. and no property shall be compulsorily acquired. nationalized or requisitioned save by authority of law.[65]

(C) Political and religious freedoms:- The Constitution guarantees freedoms of --- movement. assembly. association. thought. conscience. speech. profession or occupation or religion. [66] But the enjoyment of any right was subject ot reasonable restriction imposed by law in the interest of security of the State or public order or public health or morality or decency. There is nohard and fast rule to determine the standard of reasonableness of restriction enjoyed by the Constitution. It should be an objective standard which in a given circumstances and average prudent man would employ.[67]

Enforcement and suspension of fundamental rights :- The right to move the Supreme Court in accordance with Article 102(1) of the Constitution for the enforcement of fundamental rights has been gurarahteed.[68] As pointed out earlier under Article 102(1) the High Court Division of the Supreme Court is empowered to issue writ of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and prohibition for the enforcement of fundamental rights whenever there is any infringement of them.[69]

The fundamental rights can be suspended according to specific constitutional provisions. They can be suspended by an order of the President if an emergency is declared under Article 141A of the Constitution and so long as the order remained in force, the fundamental rights, specified in the order, could not be enforced and all pending proceedings in respect of them remained suspended.[70]

Thus, the Constitution of Bangladesh has guaranteed an ideal bill of rights which has been prepared following the general principles enunciated by the International Bill of Rights, i.e., the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966, and the Optional Protocol to the Interpational Covenant on Civil and Politicla Rights, 1966. The influence of American Bill of Rights, 1791, and the Fundamental Rights guaranteed by the Constitution of India, 1950, cannot be ignored, and whenever the Supreme Court of Bangladesh interprets the provisions relating to fundamental rights it makes references to the relevant decisions of the Supreme Courts of United States of America and India.

NOTES AND REFERENCES

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3. For the text of the Report of the Constitution Drafting Committie, 1972, see *the Bangladesh Gazette, Extraordinary*, 12th October, 1972.

4. For the text of *the Constitution of the People's Republic of Bangladesh1972* see Ministry of Law, Parliamentary Affairs and Justice, Government of the People's Republic of Bangladesh (Dhaka : Government Printing Press, 1972).
5. For the text of the Constitution (Fourth Amendment) Act, 1975, see *the Bangladehs Gazette, Extraordinary*, 25th Janurary, 1975.
6. Article 56(i) of the Constitution of Bangladesh, 1972.
7. Article 48(1). *ibid.*
8. Article 51(1). *ibid.*
9. Article 56(5). *ibid.*
10. Article 57. *ibid.*
11. Article 61. ibid.
12. Article 51(2). ibid.
13. Article 51 A/(1). ibid.
14. Article 56(2). ibid.
15. Article 55(1). ibid.
16. Article 58(1). ibid.
17. Article 58(3). ibid.
18. Article 65(1). ibid.
19. Article 65(2). ibid.
20. Article 6593). ibid.
21. Article 65(4). ibid.
22. Article 72(1). ibid.
23. Ibid.
24. Article 72, ibid.
25. Article 74(1), ibid.

26. Article 80(1), ibid.
27. Article 80(2), ibid.
28. Article 80(5), ibid.
29. Article 83, *ibid.*
30. Article 93(1), *ibid.*
31. *Ibid.*
32. *Ibid.*
33. Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (Dhaka : University Press Limited, 1984) p. 237.
34. Article 94(1) of *the Constitution of Bangladesh.*
35. Article 94(2), ibid.
36. Article 95(1) read with Article 96(1) and 96(2), ibid.
37. Article 101, ibid.
38. Aritcle 102(1), ibid.
39. Article 111, ibid.
40. Article 103(1), ibid.
41. Article 105, ibid.
42. Article 106, ibid.
43. Article 111, ibid.
44. Article 114, ibid.
45. Article 115, ibid.
46. Article 116, ibid.
47. Article 117, ibed.
48. Article 117(2), ibid.
49. An for Instances see *Habibur Rahman v. Govt. of Bangladesh*, 26 D.I.R. (1974) 201: *Tafur Uddin v. State*, 27 D.I.R. (1975) 18: *A.T. Mridha* V. *The State*, 25 D.L.R.

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50. A.B.M. Mafizul Islam patwari, *Changes in the Structure of Government under the Fourth Amendment of the Constitution of Bangladesh*, 1972. (Dhaka: University Grants Commission, 1987) at p. 22.

53. Article 26(1), ibid.

54. Article 26(2), ibid.

55. Article 27, ibid.

56. Article 31, ibid.

57. Article 29.(1), ibid.

58. Article 31, ibid.

59. Article 32, ibid.

60. Article 35(1) ibid.

61. Article 33, ibid.

62. Article 35, ibid.

63. Article 34(1), ibid.

64. Article 43. Ibid

65. Article 42(1), ibid.

66. Aritcles 36-41, ibid.

67. *Oali Ahad V. Govt. of Bangladesh*, 26 D.L.R. (1974) 376.

68. Article 44 of *the Constitution of Bangladesh, 1972*.

69. *Government of Bangladesh* v. *Ahmed Nazir*, 27 D.L.R. (A.D.)(1975) 41.

70. Articles 141B and 141C of *the Constitution of Bangladesh*.

CHAPTER III

LAWS RELATING TO CIVIL COURTS AND CIVIL PROCEDURE

1. CIVIL COURTS AND THEIR JURISDICTIONS

The Code of Civil Procedure, 1908 (Act V of 1908), forms one of the most important part of the adjective law of Bangladesh because it contains the law in accordance with which courts of civil judicature proceed in the trial of suits and other proceedings before them. Subject to the appellate jurisdiction of the Appellate Division of the Supreme Court, the High Court Division is the highest court of civil judicature in Bangladesh which has superintendence and control over (a) District Court, (b) Civil Court of a grade inferior to that of a District Court, and (c) Court of Small Causes.[1] A short discussion on these courts has been made as follows:

(a) **District Court:-** The District Court is called District Judge's Court headed by a District Judge who is empowered to transfer, withdraw, try and dispose of any suit, appeal or other proceeding.[2] The said Court has original jurisdiction relating to probate and letter of administration and guardians and wards. In some districts there are Courts of Additional District Judges who try and dispose of cases which have been transferred by the District Judge.

(b) **Inferior Courts:-** Next to the District Court there is existence of Subordinate Judge's Court which has original jurisdiction as well as appellate jurisdiction. At the *Upazilla* headquarters there is an Assistant Judge's Court which has only original jurisdiction to try cases. The said Court also acts as a Family Court under the Family Courts Ordinance, 1985 (Ordinance VIII of 1985).

(c) **Court of Small Causes:-** In fact, there is no existence of Court of Small Causes. The government may empower any experienced Assistant Judge or Subordinate Judge to try cases as mentioned in the Small Cause Courts Act. 1887 (Act IX of 1887). Section 7 of the Code of the Civil Procedure, 1908. specifically mentions that the some provisions of the Code will not be applicable in the cases of the Court of Small Cause.

Jurisdiction of Civil Courts: the Code of Civil Procedure, 1908, provides three kinds of jurisdictions: (a) jurisdiction over Subject-matter; (b) pecuniary jurisdiction; and (d) territorial jurisdiction.

(a) **Jurisdiction over subject-matter:-** The Code gives jurisdiction to the Civil courts over "all suits of civil nature," including rights to property or office, notwithstanding that question of religious rites or ceremonies are involved.[3] A civil court has no Jurisdiction to try suits which are not of a civil nature and of which its cognizance is either expressly or impliedly barred.

(a) **Pecuniary jurisdiction:-** Section 6 of the Code of Civil Procedure. 1908. provides that ". . . nothing herein ocntained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." Thus, the pecuniary jurisdiction of the Court of Assistant Judge is limited upto 20.000.00 taka. The pecuniary jurisdiction of the Court of Subordinate Judge is unlimited. So. a suit the value of the subject-matter of which exceeds 20.000.00 taka may be instituted in the Court of Subordinate Judge.

(c) **Territorial jurisdiction:-** Section 15 of the Code of Civil Procedure provides that "every suit shall be instituted in the Court of the lowest grade competent to try it." Suits regarding immovable property are to be instituted in the court within the local limits of whose jurisdiction the property is situate. But if the relief sought for can be entirely obtained through the personal obedience of the defendant. the suit may be instituted either in the court within whose jurisdiction the property is situate. or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business. or peronally works for gain.[4]

2. INSTITUTION OF SUIT

Every suit shall be instituted by the presentation of a plain.[5] which contains the following particulars: (a) the name of the court in which the suit is brought: (b) the name, description and place of residence of the plaintiff and defendant; (c) the facts constituting the cause of action and when it arose: (d) the facts showing that the court has jurisdiction: (e) the relief which the plaintiff claims; (f) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and (g) a statement of value of the subject-matter or the purposes of jurisdiction and court-fees.[6] Where the plainfiff seeks the recovery of money, the plaint shall state the precise amount claimed. [7]

The plaintiff shall file, along with the plaint, for each defendant a copy of the summons along with a pre-paid registered acknowledgement due cover with complete and correct address of the defendant written on it.[8] The court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.[9]

When a suit has been duly instituted and admitted the court shall issue a summons to the defendant to apear and answer the claim on a specified date.[10] A defendant to whom a summons has been issued may appear in person, or by a pleader [11] and file a written statement. If the defendant does not appear and it is proved that the summons was duly served upon him, the court may pass decree for the plaintiff **ex parte**.[12]

However, at the first hearing of the suit the court shall, after reading the pleadings, and after such examination of the parties as may appear necessary,[13] ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to defend.[14] Where at the first hearing of suit it appears that the parties are not at issue on any question of law or of fact the court may at once pronounce judgment.[15] When the parties are at issue the court may then fix a day for applications for better particulars, admissions, discovery, interogatories, inspection of documents and determining the mode of proof: another day is fixed for replies and third for disposal of preliminaries.

The court, after the case has been heard, shall pronounce judgment in open court and on such judgment a decree shall follow.[16] Judgments of a Court of Small Causes shall not contain more than the points for determination and decision thereon.[17] Judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.[18]

The decree shall be drawn up within seven days from the date of pronouncement of the judgment.[19] The decree shall agree to the judgment: it shall contain the number of the suits, the names and descriptions of the parties, and the particulars of the claim and shall specify clearly the relief granted or other determination of the suit.[20]

The Code of Civil Procedure, 1908, provides that a decree may be executed either by the court which passed it, or by the court to which it is sent for execution.[21] The court may, on the appliction of the decree holder, order execution of the decree---(a) by delivery of any property specifically decreed; (b) by attachment and sale or by sale without attachment of any property; (c) by arrest and detention in prison; (d) by appointing a receiver; (e) in such other manner as the nature of the relief granted may require.

3. APPEAL, REFERENCE, REVIEW AND REVISION

Appeal: The Code of Civil procedure, 1908, provides appeal from original decree in the following cases: (a) an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the decision of such court; (b) an appeal may lie from an original decision of such court; (b) an appeal may lie from an orginal decree passed *ex parte*.[22] But an appeal shall not lie from a decree passed by the court with the consent of parties.[23]

In the following cases appeals from pereliminary decree and final decree have been provided in the Code of Civil Procedure. 1908. When a party aggrieved by a preliminary decree does not appeal from such decree. he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.[24] When an appeal is heard by a Bench of two or more Judges. the appeal shall be decided in accordance with the opinion of such Judges or of the majority of such Judges.[25] Where there is no such majority which concurs in a judgment varying or reversing the decree appeal from. such decree shall be confirmed.[26]

There are some orders from which appeal lies such as (a) an order under section 35-A: (b) an order under section 95: (c) an order imposing a fine or directing the arrest or detention in the civil prison of any person: (d) any order made under rules from which an appeal is expressly allowed by rules.[27]

Reference: The Code of Civil Procedure. 1908. provides that any Court may state a case and refer the same for the opinion of the High Court Division of the Supreme Court and the High Court Division may make such order thereon as it thinks fit.[28]

Review: Any person considering himself aggrieved —— (a) by a decree or order from which an appeal is allowed by this Code. but from which no appeal has been preferred. (b) by a decree or order from which no appeal is allowed by this Code. or (c) by a decision on a reference from a Court of Small Causes --- may apply for a review of judgment to the Court which passed the decree or made the order. the court may make such order thereon as it thinks fit.[29]

Revision: The High Court Division of the Supreme Court may call for the record of any case which has been decided by any court subordinate to it and, in which no appeal lies thereto. and if such subordinate court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice, the High Court Division may make such order in the case as it thinks ifit.[30]

Besides these powers, the court may in many cases where the circumstances require it, act upon the assumption of the possession of an inherent power to do that real and substantial justice for the administration of which alone it exists.[31] This inherent power of the court has been codified in the following word "Nothing in this Code shall be deemed to limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."[32]

4. IMPACT OF LAW OF LIMITATION ON CIVIL PROCEDURE

The Code of Civil Procedure, 1908, must be read with the Limitation Act, 1908(Act IX of 1908), because whether limitation is pleaded or not the Court shall dismiss a suit instituted, or an appeal preferred, and an application made, after the period of limitation which varies from ninety days to sixty years for different categories of proceedings.[33] However, some exceptions have been provided in which the period of limitation may be extended. These are as follows:

(A) **Prevention**:- The operation of limitation is prevented due to existence of any of the following grounds: (1) Where the plasintiff suffers from legal disability due to his minority, inanity or idiocy:[34] (2) where there is no person in existence capable of suing or being sued:[35] (3) where no specific injury has resulted from the act complained of [36]; or (4) where the right to sue is fraudalently concealed from the plaintiff by the defendant or any person through whom the defendant claims.[37]

(B) **Interruption:-** The running of period of limitation is interrupted due to the existence of any of the following grounds: (1) continuing breach of contract or continuing wrong independent of contract[38]; (2) acknowledgment[39]; or (3) part payment.[40]

(C) **Suspension:-** The running of period of limitation is suspended due to the existence of any of the following grounds: (1) where letters of administration to the estate of a creditor have been granted to his debtor, and the adminsitration continues[41]; (2) where the defendant remain absent;[42] (3) where the plaintiff has been prosecuting in good faith and with due diligence another civil proceeding against the defendant, for the same cause of action in a court which from defect of jurisdiction or other cause of like nature is unable to entertain it[43]; (4) where the commencement of the suit has been stayed by injunction or like nature[44]; (5) where the judgment-debtor took proceedings to set aside the execution-sale of property which the purchaser is seeking to recover by suits[45]; or (6) where notice has been given to the defendant in accordance with the requirement of any law.[46].

These are the main exceptional cases during the continuance of which time will not run against the plaintiff.

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1. Section 3 of the Code of Civil Procedure, 1908. See also section 3 of the Civil Courts Act 1887 (Act xii of 1887).
2. Section 24, *ibid.*

3. Section 9. *ibid.*
4. Section 16. *ibid.*
5. Section 26. *ibid.*
6. Rule 1 of Order VII, *ibid.*
7. rule 2. *ibid.*
8. Rule 1b of Order IV. *ibid.*
9. Rule 2 of Order IV, *ibid.*
10. Section 27 and rule 1 of Order V. *ibid.*
11. Rule 1(2) of Order V and rule 1 of Order VIII. *ibid.*
12. Rule 6 of Order IX. ibid: *Amrit Nath* v. *Dhanput*. (1871) 15 W.R. 503.
13. Rule 1 of Order X of the Code of Civil Procedure. 1908.
14. Rule 1 of Order XIV. *ibid.*
15. Rule 1 of Order XV. *ibid.*
16. Section 33 and rule 1 of Order XX. *ibid.*
17. Rule 4(1) of Order XX, *ibid.*
18. Rule 4(2) *ibid.*
20. Rule 6(1). *ibid.*
21. Sections 38 and 39, *ibid.*
22. Section 96(1) and 96(2). *ibid.*
23. Section 96(3). *ibid.*
24. Section 97, *ibid.*
25. Section 98(1), *ibid.*
26. Section 98(2), *ibid.*
27. Seciton 104. *ibid.*
28. Section 113. *ibid.*
29. Section 114. *ibid.*

30. Section 115. *ibid.*
31. *Hukum Chand* v. *Kamalanand.* (1906)33 Cal. 927.
32. Seciton 151 of the Code of Civil Procedure. 1908.
33. Section 3 read with First Schedule of the Limitation Act. 1908.
34. Secitons 6-7. *ibid.*
35. Section 17, ***ibid.***
36. Section 24, ***ibid.***
37. Section 18, ***ibid.***
38. Section 23, ***ibid.***
39. Section 19, ***ibid.***
40. Section 20, ***ibid.***
41. Proviso to section 9, ***ibid.***
42. Section 13, *ibid.*
43. Section 14, *ibid.*
44. Section 15(1), *ibid.*
45. Section 16, *ibid.*
46. Section 15, (2), *ibid.*

CHAPTER IV

SOME CIVIL LAWS

1. LAW OF SPECIFIC RELIEF

The Court of Equity in England had evolved special reliefs by which the performance of every obligation undertaken by persons could be enforced against them. The courts of Indian Sub-continent had borrowed these rules from the Court of Equity and applied them as "justice, equity and good conscience." Attempts were made to modify them and many principles of Equity had been incorporated in a statute called Specific Relief Act, 1877 (Act I of 1877), the purpose of which was "to make these equitable reliefs to some extent available to persons entering into contract."[1]

Under the Specific Relief Act, 1877, specific relief is given (a) by taking possession on certain property and delivering it to a claimant; (b) by ordering a party to do the very act which he is under obligation to do; (c) by preventing a party from doing that which is under an obligation not to do; (d) by determining and declaring the rights of parties otherwise than an award of compensation; or (e) by appointing a receiver.[2] The specific performance of any contract may in the discretion of the court be enforced -- (a) when the act agreed to be done is in the performance, wholly or partly, of a trust; (b) when there exists no standard ascertaining the actual damage caused by non-performance of the act agreed to be done: (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; and (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.[3]

Under the Specific Relief Act, 1877, the following contracts cannot be specifically enforced: (a) a contract for the non-performance of which compensetion in money is an adequate ralief; (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the court cannot enforce specific performance of its material terms; (c) a contract the terms of which the court cannot find with reasonable certainty; (d) a contract which is in its nature revocable; and (e) a contract made by trustees either in excess of their powers or in breach of their trust.[4]

The Act gives jurisdiction to the court to rectify an instrument which, on account of fraud or mutual mistake, does not truly express the intention of the parties.[5] A party to a written contract may sue to have it rescinded if it is voidable or terminable at his instance or if, for reasons not apparent on the face of it, it is unlawful and the defendant is more blame-worthy or if the holder of a decree of specific performance of a contract of sale or lease defaults in payment.[6] Any person against whom a written instrument is void or viodable, who has reasonable apprehension that such instrument, if left outstanding may cause his serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.[7] Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right; and the court may in its discretion make therein a declaration that he is so entitled.[8]

Under the head of preventive relief the Act deals with injunction. Temporary injunction may be granted at the period of a suit, and is regulated by the Code of Civil Procedure, 1908. A perpetual injunction can be granted by the decree made at the hearing and upon the merits of the suit.[9] It can be granted to prevent a breach of an obligation in favour of the plaintiff.[10] The court is entitled to grant mandatory injunction in order to prevent the breach of an obligation.[11]

The Specific Relief Act, 1877, grants relief to the aggrieved parties in some specific cases where there are no other reliefs or where other reliefs are not adequate; and in this way the Act has codified some of the equitable principles and in some cases has made a remarkable departure from them.

2. LAW OF TRUST

Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidence to the existence of which a double ownership, a 'legal' and an 'equitable' estate, is necessary, are unknown to Hindu and Muslim laws.[12] But trusts in the wider sense of the word, that is to say, "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner"[13] are created by the people of Bangladesh (as well as of India and Pakistan) and are frequently enforced by the courts.

Under Trusts Act, 1882 (Act II of 1882), a trust may be created for any lawful purpose. A Trust for an unlawful, fraudalent or immoral purpose or a purpose opposed to public.

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policy is void.[14] A trust of immovable property may be declared by will or by registered instrument.[15] In the case of movable property trust is valid after the ownership of the property is transferred to the trustee.[16]

A trustee must deal with the trust property as a prudent man would deal with his own.[17] Where the trust is created for the benefit of several persons in succession, the trustee is bound to convert the wasting assets into property of a permanent profitable character.[18] The trustee must be impartial between co-beneficiaries, keep accounts and inform the beneficiaries about the trust property.[19] Where the trust-property consists of money which need not be spent immediately, the trustee is bound to invest the money on some specified securities.[20] If he commits a breach of trust, he is liable to make good the loss which the beneficiary has sustained unless the latter has induced him to do it by fraud or has freely consented or acquiesced, with full knowledge of the facts of the case.[21]

A trustee is entitled to have in his possession the instrument of trust and all the documents of title relating solely to the trust-property.[22] The trustee is entitled to expense incurred in the execution of the trust and in the realization, preservation and protection of the trust-property.[23] He may recover over-payments; he has made, from the beneficiary.[24] He may apply to the court for its opinion, advice or direction on management or administration of the trust-property.[25] When the duties of a trustee are completed, he is entitled to have his accounts settled and an acknowledgement from the beneficiary that nothing remains due.[26]

The beneficiary has a right to the rents and profits of the trust-property.[27] Where the execution of a trust by the trustees is impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall be executed by the court until the appointment of a trustee or new trustee.[28] Where a trustee has wrongfully bought trust-property the beneficiary has a right to have the property declared subject to the trust: he may take similar action in regard to property in the hands of a third party other than a transferee for value without notice of the trust.[29] He has, as far as possible, the same rights over the proceeds of sale in the hands of a trustee as he had in the trust-property.[30] Where the trustee wrongfully mingles the trust-property with his own, the beneficary has a charge over the whole fund.[31]

A Trust is extinguished --- (a) when its purpose is completely fulfilled; (b) when its purpose becomes unlawful; (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or (d) when the trust being revocable, is expressly revoked.[32] A trust created by will may be revoked at the pleasure of the testator.[33] Moreover, the Act provides other methods of revocation of a trust.

The trusts Act, 1882, though based on the equitable principles but in it there are some elements of prevailing custom of the Indian Sub-continent. The very concept of trust makes departures from the English concept and these departures are available in many sections of the Act.

3. LAW OF TRANSFER OF PROPERTY

Before passing the Transfer of Property Act, 1882(Act IV of 1882), the transfer by act of the parties was conducted by the English law of real property. But the English law of real property being generally unsuitable to circumstances in the Indian Sub-continent the Transfer of Property Act, 1882, was passed in which the departures from the English law are more pronounced.[34]

The Transfer of Property Act, 1882, is limited to transfer **inter vivos** and subject ot exceptions its provisions do not apply to the Muslims.[35] Unless a different intention is expressed or necessarily implied, the whole interest of the transferor is passed.[36] No transfer of property can operate to create an interest which is to take effect after the life-term of one or more persons living at the date of such transfer, and the minority of some persons who shall be in existence at expiration of that period, and to whom, if he attains full age, the interest created is to belong.[37]

While legal proceedings are pending regarding any right in immovable property, it cannot be dealt with by any party to the proceedings so as to affect the rights of any other party.[38] Every transfer of immovable property made with intent to defeat or delay the creditor, expect to a transferee in good faith and for consideration, is voidable at the option of any creditor so defeated or delayed.[39]

The dotrine of part performance as developed in England in the case of **Maddison v. Alderson**[40] has been imported into Indian Sub-continent in "a modified form"[41] in seciton 53A as inserted by section 16 of the Transfer of Property (Amendment) Act, 1929(Act XX of 1929). The object of this section is to prevent a transferor or his successor-in-interest from taking any advantage on account of the non-registration of the document provided the transferee has perfomed his part of the contract and in pursuance thereof has taken prossession of some immovable property.

A sale of immovable property of the value of one hundred taka and upwards can be made by registered instrument.[42] If part of immovable property subject to a mortgage is sold the purchaser is entitled to have the mortgage satisfied as far as possible out of the part retained by the vendor.[43] A mortgage other than a mortgage by deposit of title deeds. for taka one hundred and upwards can only be effected by registered instrument signed by the mortgagor and attested by at least two witnesses.[44] A lease of immovable property from year to year. or for any term exceeding one year. or reserving a yearly rent. can be made only by a registered instrument.[45] A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.[46] If any party is deprived of the property received by reason of any defect in the other's title. he is entitled to compensation or the return of the property delivered. if still in the possession of the other party.[47]

Gift of immovables is made by the registered instrument or movables either by registered instrument or delivery.[48] If the donee dies before the acceptance. the gift is void.[49] A gift comprising both existing and future property is void as to the latter.[50] A gift revocable at the donor's will is void but a gift revocable on the happening of a future uncertain event is valid.[51]

The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent.[52] The transferee of an actionable claim may. upon the execution of such instrument of transfer. sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit of proceedings and without making him a party thereto.

These are the kinds of transfer which the Transfer of Property Act, 1882, deals with. The Act, is not a complete

Code. So, when the provisions of the Act are not applicable to a case. the courts are entitled to apply rules of English law. not inconsistent with the Act, as rules of justice. equity and conscience.[54]

4. LAW OF REGISTRATION

The Registration Act. 1908 (Act XVI of 1908), enacted provisions complementary to those in the Transfer of Property Act. 1882, which made a registered instrument essential to the validity of certain transfers. Moreover, the Registration Act. 1908. provides certain documents of which registration is compulsory. The following documents shall be registered: (a) instrument of gift of immovable property: (b) other non-testamentary instruments which purport or operate to create. declare. assign. limit or extinguish. any right. title or interest of the value of one hundred taka and upwards. to or in immovable property: (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation of extinction of any such right. title or interest: (d) leases of immovable property from year to year. or for any term exceeding one year. or reserving a yearly rent: and (e) non-testementary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create. declare, assign. limit or extinguish. any right. title or interest of the value of one hundred taka and upwards. to or in immovable property.[55]

These documents are registrable within four months of execution. but take effect from the date of execution.[56] Other instruments creating interests in property may be registered at the option of a party.[57] and generally take effect against unregistered instruments. A document required to be registered does not operate to create any right, title or interest unless it has been registered.[58]

The instruments presented for registration are authenticated by the Sub-Registrar, and often enquiry into the identity of the parties and witnesses, and after he is satisfied that the party changed understands the tenor of the instrument.[59] All registered documents are copied and indexed by the Sub-Registrar, so that an intending purchaser or mortgagee can find in the registration office a complete record of any transaction other than devolution on death, affecting the land in question but the State does not guarantee any tiltle.[60]

Notes and References

1. M. C. Setalvad, *op. cit.*, at p. 91.
2. Section 5 of the Specific Relief Act, 1877.
3. Section 12, ***ibid.***
4. Section 21, ***ibid.***
6. Section 35, ***ibid.***
7. Section 39, ***ibid.***
8. Section 42, ***ibid.***
9. Section 53, ***ibid.***
10. Section 54, ***ibid.***
11. Section 55, ***ibid.***
12. *Tagore* v. ***Tagore***, 9 B. L.R. 401.
13. Section 3 of the Trusts Act, 1882.
14. Section 4, ***ibid.***

15. Section 5, *ibid.*
16. *Ibid.*
17. Section 15, *ibid.*
18. Section 15, *ibid.*
19. Section 17 and 19, *ibid.*
20. Section 20, ibid. *Learoyd* v. *Whiteley*, 12: A.C. 727.
21. Section 23, *ibidl.*
22. Section 31, *ibid.*
23. Seciton 31, *ibid.*
24. *Ibid*
25. Section 34, *ibid.*
26. Section 35, *ibid.*
27. Section 55, *ibid.*
28. Seciton 59, *ibid.*
29. Section 62, *ibid.*
30. Section 63, *ibid.*
31. Section 66, *ibid.*
32. Section 77, *ibid.*
33. Section 78, *ibid.*
34. Alan Gledhill, *op. cit.*, at p. 310.
35. Sections 5 and 2 of the Transfer of Property Act, 1882.
36. Section 8, *ibid.*
37. Section 14, *ibid.*
38. Section 51, *ibid.*
39. Section 53, *ibid.*
40. (1883) 8 A.C. 467.

41. D.F. Mulla. *The Transfer of Property Act. 1882* (Bombay: N.M. Tripathi Private Ltd.. 1973) p. 284.
42. Section 54 of the Transfer of Property Act. 1882.
43. Section 56. ***ibid.***
44. Section 59. ***ibid.***
45. Section 107. ***ibid.***
46. Section 107. ***ibid.***
47. Section 118. ***ibid.***
48. Section 123. ***ibid.***
49. Section 122, ***ibid.***
50. Section 124, ***ibid.***
51. Secton 126. ***ibid.*** .
52. Section 130(1). ***ibid***.
53. Section 130 (2). ***ibid***.
54. ***jeypur*** *v.* ***Rukmim***. (1919) 42 Mad. 589 P.C.
55. section 17 of the Registration Act. 1908.
56. Section 23. ***ibid***.
57. Section 18. ***ibid***.
58. Section 49. ***ibid***.; **Basawara v. Kalkapa.** (1878)2 Bom. 489; ***Connecticut Insurance Co***. v. Kavanagh.(1892) A.C. 473.
59. Sections 31-35 of the Registration Act, 1908.
60. Section 51-57. ***ibid***.

CHAPTER V

PERSONAL LAWS

1. SOURCES AND SCHOOLS

Among the people of Bangladesh two major systems of personal law prevail: Muslim law among the Muslims and Hindu law among the Hindus.[1] Both of these personal laws are based on religious beliefs but they are fundamentally different in major aspects. They are not codified but some changes have been made by legislative enactments with a view to coping with the changing circumstances of the prevailing society.

To begin with Muslim law which has four main sources: the *Koran*, *Sunnah* (practice of prophet Muhammad Sm.), *Ijma* (consensus opionion) and *Quyas* (analogical deduction). There are main two schools of thought under Muslim law: the *Sunni* school and the *Shia* school. The *Sunni* school is sub-divided into four schools: the *Hanafi* school, the *Maliki* school, the *Shafei* school and the *Hanbali* school. In Bangladesh the *Sunni* school predominates.

The Hindu law is the ancient law of Bangladesh. The sources of classical Hindu law are three in number: the *Shruti* (waht is heard), the *Smriti* (waht is remembered) and custom. When there is a conflict between a custom and a text of the Smritis the custom override the text.[2] There are two main schools of Hindu law: the *Mitakshara* and the *Dayabhaga*. The *Mitakshara* is of superior authority throughout India except West Bengal. The *Dayabhaga* is of suprerior authority in West Bengal and Bangladesh.

2. MARRIAGE

Muslim Law: under Muslim law marriage*(nikah)* is defined as a contract for the legalization of intercourse and the procreation of children. "It implies a particular contract used for the purpose if [sic.] legalizing generation."[3] "Marriage among the Muhammadans is not a sacrament, but purely a civil contract." [4]

For the validity of a marriage the following conditons must be fulfilled: there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other; the proposal and acceptance must be expressed at one meeting; the proposal and acceptance must be made in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Muhammadans.[5] The bride's dower should be fixed at the wedding and is usually divided into two parts: prompt and deferred, the former being payable forthwith and the latter on the dissolution of the marriage by the death of the husband or wife. The Muslim Family Laws Ordinance, 1961 (Ordinance VIII of 1961), requires a Muslim marriage to be registered by *nikah* registrar.[6]

Effects of a valid marriage are as follows: sexual intercourse become lawful and children born of the union are legitimate; the wife is entitled to dower; the wife is entitled to maintenance; the husband is entitled to exercise marital authority; mutual rights of inheritance are established; prohibitions regarding marriage comes into operation; and the wife does not change her status on marriage.[7]

Hindu law: Marriage under Hindu law is a holy union for the performance of religious duties. it is regarded not only as "a civil contract, but also as a sacrament".[8] It is more religious than secular in character. The union is indissoluble, for it is a union of flesh with flesh, and bone with bone.[9]

The following are the essentials of a valid marriage: the bridegroom must have capacity to marry; the parties to a marraige belong to the same caste; the girl must be given in marriage by the guardian; parties should not be within the prohibited degrees ; and marriage ceremonies, i.e. invocation before the sacred fire and *saptapadi* (taking of seven steps by the bridegroom and the bride jointly before the sacred fire), must be performed. The marriage becomes completed when the seven step is taken; till then it is imperfect and revocable.[10]

The following are the legal effects of a marriage: the wife is bound to live with her husband, and to submit herself to his authority; the husband is bound to live with his wife and to maintain her; either party to a marriage is entitled to sue the other for the restitution of conjugal rights; children born of the busband and wife are legitimate: and after the death of the husband the widow, subject to exception, is bound to reside with her husband's family.

3. DIVORCE

Muslim Law: A Muslim marriage may be dissolved in any of the following ways: by the death of the spouse; by the husband at his will without the intervention of a court; by mutual consent of the husband and wife, without the intervention of a court; and by judicial process.

When the dissolution or divorce is effected by the husband at his will without the intervention of a court it is called *talak* (repudiation). Any Muslim of sound mind, who has attained puberty, may divoce his wife whenever he desires without assigning any cause.[11]

The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after the marriage. but under the Dissolution of Muslim Marriage Act, 1939 (Act VIII of 1939), a married woman may seek dissolution before a court on any of the following gounds: whereabouts of the husband are unknown for a period of four years; failure of the husband to provide for the maintenance of the wife for a period of two years; sentence of imprisonment on the husband for a period of seven years; without reasonable cause to perform marital obligations; impotence of the husband; insanity of the husband; repudiation of marriage by wife on attaining mjority; cruelty of the husband; and any other grounds recognised by the Muslim law.[12] The Muslim Family Laws Ordinance, 1961, has provided another ground of dissolution that if the husband has taken an additional wife in contravention of the provisions of the said Ordinance the wife may seek dissolution of the marriage.[13]

Hindu Law: Divorce is not known to the general Hindu law.[14] Change of religion or excommunication from the caste does not effect a divorce [15]. The adultery of either party or the fact that the wife has deserted her husband and become a prostitute does not operate as a dissolution of marriage.[16]

Though the classical Hindu law does not permit dissolution of marriage. but there are some statutes under which dissolution of marriage may be sought. Thus, the Native Converts' Marriage Dissolution Act, 1866 (Act XXXI of 1866), provides that where a Hindu becomes a convert to Christianity, and in consequence of such conversion the husband or wife of the convert deserts or repudiates the convert, the court may on a petition presented by the convert, pass a decree dissolving the marriage, and the parties may then marry again as if the prior marriage has been dissolved by death. Conversion does not operate *per se* as a dissolution of marriage.[17]

As a Hindu in Bangladesh can marry under the provisions of the Special marriage Act, 1872 (Act III of 1872), a divorce can be had in accordance with the provisions contained therein, if the marriage took place under that Act.

The Hindu widows Remarriage Act, 1856 (Act XI of 1856). has legalised the remarriage of a Hindu widow. The Act provides that the parties to such a marriage must observe the formalities and ceremonies for a valid marriage under the general law or usage governing the marriage.

Though remarriage of Hindu widow is permitted under the statute, but only in few cases remarriage takes place among the Hindus in Bangladesh.

4. GUARDIANSHIP

Muslim Law: guardianship under Muslim law may be of the person, or property and in marriage. In the first instance there is guardianship of the person. Under *Hanafi* school the mother is entitled to the custody *(hizanat)* of her male child until she has completed the age of seven years or of her female child until she has attained puberty. But the mother is not "the natural guardian; the father alone, or, he be dead, his executor (under the *sunni* law) is the legal guardian."[18]

Failing the mother the following female relations are entitled to custody in order of priority: mother's mother how high soever; full sister; uterine sister; consanguine sister; full sister' daughter; uterine sister's daughter; consanguine sister's daughter; maternal aunt, in like order as sisters; and paternal aunt in like order as sisters. In default of the mother and the female relations the custody belongs to the following persons in order given below: the father; nearest paternal grandfather; full brother; consanguine brother; full brother's son; consanguine broher's son; full brother of the father; consanguine brother of the father; son of father's full brother; and son of father's consanguine brother.

As regards guandianship of property, father is the legal guardian of the minor's property. Failing him, in order of priority, the following are entitiled: father's executor; father's father; and father's father's executor. In default of the legal guardian the duty of appointing a guardian for the protection and preservation of the minor's property falls on the judge as representing the State.[19]

A person may neither be a legal guardian nor a guardian appointed by the court, but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de fecto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor.[20]

As regards guardianship, a minor can only be given in marriage by a marriage guardian *(wali)* . A guardian must "be major, sane and free"[21] Muslim. The following persons are entitled, in order of priority, to act as guardian in marriage: the father; the father's father how highsoever; the brother and other collaterals according to the priorities in the law of inheritance; the mother and maternal relations; and finally the ruling authority, that is, the *Qazi* or the court.[22] A parson, if married during minority, has on attaining majority, the right to terminate the marriage by exercising the option of puberty *(khyar-ul-bulugh)*. if he is still unmarried, guardianship terminates. and such person has the absolute right to contract a lawful marriage. The rule applies both to men and women, but there is a difference of opinions as regards women.[23]

Hindu Law: Guardianship under Hindu law may be divided into four classes: (A) natural guardians; (b) testamentary guardians (c) guardians appointed by the court; and (d) *de facto* guardians. (a) **Natural guardians:** the father is the natural guardian of the person and property of his minor children, and next to him the mother, unless the father has by his will appointed another person as the guardian of the person of his children. (b) **Testamentary guardians:** Hindu father may by his will nominate a guardian for his children so as to exclude even the mother from the guardianship. (c) **Guardians appointed by the court:** where the court is satisfied that it is the welfare of a minor an order should be made appointing a guardian of his person or property, or both, the court may make an order under the Guardians and Wards Act. 1890 (Act VIII of 1990), appointing a guardian. [24] (d) ***De facto* guardians:** a person who manages the affairs of the infant in the same way as *de jure* guardian does should be described as a *de facto* guardian although is not a natural guardian or a guardian appointed by the court.[25]

As regads guardianship in marriage it can be noted that the following persons are qualified, in order of priority, to be gurardians of the girl in marriage: father; paternal grandfather; brother; other paternal relations of the girl in order of propinquity; maternal grandfather; maternal uncle; and mother.[26] The following persons, in order of priority, are guardians in remarriage of a widow: the father; full paternal grandfather; mother; elder brother; other brothers; and next male relatives. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient to constitute her remarriage lawful and valid.[27]

5. PATERNITY

Muslim Law: Paternity of a child can be established by the valid or irregular marriage between the parents of the child. Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption of legitimacy drawn from centian facts.

The rules as regards presumption of legitimacy under Hanafi law may be stated as follows: (a) a child born within less than 6 months after marriage is illegitimate; (b) a chilf born after 6 months from the date of marriage is presumed to be legitimate, unless putative father disclaims the child by *lian;* (c) a child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *lian.*[28].

The present rule on the subject is to be found in the conclusive presumption raised in section 112 of the Evidence Act, 1872 (Act I of 1872). The rule may be shortly stated as follows: a child born during the continuance of a valid marriage, or within 280 days after its disolution, the mother remaining unmarried is conclusively presumed to be legitimate, unless there was no access when he could have been begotten. This rule, it was held, superseded Muslim law and it applied to Muslims. [29]

The rule as regards acknowledgement of legitimacy may be stated as follows: where the paternity of a child cannot be proved by establishing a marriage between his parents at the time of his conception or birth, Muslim law recognises acknowledgement as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for the purposes of inheritance. In order to render the acknowledgement valid and effectual the following conditions must be fulfilled: (a) the paternity of the child is not established in any one else; [30] (b) the age of the parties are such that they may be father and child; [31] (c) the acknowledgement must not have been repudiated by the person acknowledged; [32] (d) the person acknowledged must not be the offspring of *zina*; [33] and (e) the acknowledgement is not merely of sonship but of legitimate sonship.[34]

The following are the effects of a valid acknowledgement: the acknowledgement of the children has the legal effect of the acknowl— edgement of the wife as well; the acknowledgement of a man is valid with regard to five persons -- his father, mother, child, wife and freed slave *(mawla)*. A valid acknowledgement gives rights of inheritance to the children, the parents and the wife. Acknowledgement once made is not revocable.[35]

Hindu Law: As a general rule paternity of a child can be established by the marriage between the parents of the child. The marriage between the parents like Muslim may be established by direct proof, or indirect proof, that is, by presumption of legitimacy as provided in section 112 of the Evidence Act, 1872.

Besides this natural child, Hindu law in Bangladesh recognises another kind of son, adopted *(dattaka)* son. The objects of adoption are twofolds: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors; the second is secular, to secure an heir and to perpetuate the adopter's name.[36]

For the validity of an adoption the following requirements must be fulfilled: (a) the person adopting is lawfully capable of taking in adoption; (b) the person giving in adoption is lawfully capable of giving in adoption; (c) the person adopted is lawfully capable of being taken in adoption; (d) the adotion is completed by an actual giving and taking; and (e) the ceremony called *datta* *homam*(oblation to fire) has been performed.[37]

The effects of a valid adoption are as follows: (a) an adoption operates as "birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption."[38] (b) Adoption does not severe the tie of blood between the adopted son and the members of natural family. (c) Subject to exceptions, an adopted son is entitled to inherit in the adoptive family as if he were a natural born son, both in the paternal and mternal lines. (d) The wife of the adopted person, but not his son born prior to the date of adoption, passes with her husband into the adoptive family because according to *shastra* husband and wife form one body.[39]

Thus, the Hindu law provides a peculiar system of paternity and sonship which is totally prohibited in Muslim law.

NOTES AND REFERENCES

1. Besides the Muslims and Hindus some Buddhists and Christians live in Bangladesh. They follow their own personal laws.
2. In the case of *Collector of Modura* v. *Moottoo Rama Linga* it has been held: "under the Hindu system of law, clear proof of usage will outweigh the written text of the law." (1868)12 M.I.A. 397 at.p. 436.
3. Charles Hamilton, *the Hedaya* (Lahore: premier Book House, 1963) p. 25.
4. *Abdul Kadir* v. *Salima*, (1886)8 All. 149, per Mahmood J. at p. 154.
5. See Nail B.E. Baillie, *A Digest of Moohummudan Law* (Lahore: Premier Book House, 1963) pp. 1-2.

6. Section 5 of the Muslim Family Laws Ordinance, 1961.
7. Faiz Badaruddin Tyabji, *Muslim Law* (Bombay: N.M. Tripathi Private Limited, 1968) pp. 55-57.
8. Gooroodass Banerjee, *the Hindu Law of Marriage and Stridhan* (Calcutta: S.K. Lahiri and Co., 1923) p. 37.
9. *Tikait Monmohini* v. *Basant Kumar*, 28 Cal. 751, at p. 758.
10. *Chunilal* v. *Surajram*, (1909) 33 Bom. 433.
11 *Ahmad Kasim* v. *Khatun Bibi*, (193259 Cal. 833.
12. Section 2 of the Dissolution of Muslim Marriage Act, 1939.
13. Section 13(a) of the Muslim Family Laws Ordinance, 1961.
14. Ernest John Trevelyan, *Hindu Law as Administered in British India* (Calcutta: Thacker Spink & Co., 1917) p. 63.
15. *Ibid*., at p. 64; Golap Chandra Sastri Sarkar, *the Hindu Law* (Calcutta: S.C. Sarkar, 1940) p.143; Hari *Singh* Gour, *the Hind Code* (Nagpur: the Central Book Depot, 1938) p. 143.

    Cf. *Ayesha Bibi* v. *Subodh Ch. Chakaravarty*, A.I.R. 1949 Cal.436.
16. *Government of Bombay* v. *Ganga*, (1880)4 Bombay 330.
17. *Gobardhan* v. *Jasadamoni*, (1891) 18 Cal. 252.
18. *Imambandi* v. *Mutsaddi*, (1918) 45 I.A. 73 at p. 83.
19. *Ibid*., pp. 83-84.
20. *Ibid*.. *Mohammad Ezazz* v. *Mohammad Iftikhar*, (1932) 59 I.A. 92, at p. 101.
21. Syed Ameer Ali. *Mohammedan Law* (Lahore: All Pakistan Legal Decisions. 1965) p. 264.

22. *Ibid.*, at pp. 265-266.
23. Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1977) p. 210.
24. Sections 4,5 and 7 of the Guardians and Wards Act, 1890.
25. *Hunooman Persaud* v. *Mussumat Babooee*, (1856) 6 M.I.A. 393, at p. 412.
26. D.F. Mulla, *Principles of Hindu Law* (Bombary: N.M. Tripathi Private Limited, 1982) p. 555.
27. Ernest John Trevelyan, *op. cit*,. at p. 51.
28. D.F. Mulla, *Principles of Mahomedan Law* (Bombay: N.M. Tripathi Private Limited, 1977) pp. 351-354.
29. *Muhammad Allahadad* v. *Muhammad Ismail*, (1880) 10 All. 289; *Sibt Muhamnad* v. Muhammad, (1926)48 All. 625; *Mt. Rahim Bibi* v. *Chiragh Din*, A.I.R. 1930 Lahore 97. See also Faiz Badaruddin Tyabji, *op. cit.*, at p. 204.
30. Charles Hamilton, *op. cit.*, at p. 439.
31. Syed Ammer Ali, *op. cit.*, at p. 196.
32. *Habibur Rahman* v. *Altaf Ali Chowdhury*, (1921) 48 I.A. 114.
33. *Ibid.*
34. *Ibid.*
35. *Ashrufood Dowlah* v. *Hyder Hossein*, (1866) 11 M.I.A. 94.
36. *Bal Gangadhar Tilak* v. *Shrinivas*, (1915) 42 I.A. 135.
37. For details see D.F. Mulla, *Principles of Hindu Law*, at pp. 269-604.
38. Golap Chandra Sastri Sarkar, *op. cit.* , at p. 196.
39. *Kalgavda* v. *Somappa*, (1909)33 Bom. 669.

CHAPTER VI

AGRARIAN AND NON-AGRARIAN LAWS

1. AGRARIAN LAW

The East India Company acquired the *Diwani* of Bengal, Bihar and Orissa in 1765 A.D. and introduced Permanent Settlement into the land system in 1793. Permanent Settlement continued upto the 13th April, 1956. On the 16th March, 1951, a new legislation entitled State Acquisition and Tenancy Act, 1950 (Act XXVIII of 1951). was passed for "the acquisition by the State of interests of rent-receivers and certain other interests in land in Bangladesh..."[1] The Act came into effect on the 14th April, 1956.

The Act enables the then Provincial Government to acquire by notification in the Official Gazette all interests of the rent-receivers as might be specified in the notification in their respective estates, taluks, tenures, holdings or tanancies in any district, part of a district or local areas. [2] The Act also empowered the Government to acquire in a similar manner all or any of the lands in the *khas* possession of such rent-receivers of which they were not entitled to retain possession under section 20 of the said Act.[3] According to sectioin 20 a rent-receiver was ntitled to retain under the Government 375 standard *bighas* or n area determined by calculating at,the rate of 10 standard *ighas* for each member of his family whichever was greater. A rent-receiver, however, might be allowed to retain land in excess of the prescribed limit on the basis of a certificate granted by the Revenue Authority in the following cases: (a) when he has undertaken large acale farming on a co-operative basis or otherwise by the use of power-driven mechanical appliances[4] or (b) when he has undertaken large scale dairy farming;[5] or (c) when a person holds land for the purpose of cultivation and manufactures of tea, coffee or rubber;[6] (d) when a company holds land for cultivation of sugarcane for manufacturing sugar;[7] or (e) when raw materials are grown by large scale industry.[8] He cannot retain the following classes of lands: (a) any land or building in a *hat* or *bazar*;[9] (b) any fishery other than tank constructed solely by process of excavation; (c) any land consisting of forest; (e) any land actually in use for a ferry; (f) office or **cutchery** for the collection of rent: and (g) derelict tea garden.[9A]

The consequences of acquisition of the interests of a rent-receiver may be summarised as follows: (a) all interests of the rent receivers as specified in the notification shall vest absolutely in the Government free from all encumbrances.[10] From the date of acquisition of the interests of rent-receivers, all tenants holding lands under the rent-receivers will be tenants directly under the Government.[11] Similar is the case of persons who were holding over as tenants after the expiry of the lease.[12] After the acquisition of the interests of the rent-receivers there will be only one class of tenants, namely a *raiyat* under the Government. That being so under-*raiyats* are up-graded as *raiyats*.[13] They will be regarded as *maliks* (proprietors) of the land.[14] When the tenants have come diractly under the Government they are to pay rent of their holdings to the Government and not to any body else.[15] On the acquisition of their interests the rent-receivers are entitled to compensation.[16]

The Act also provides an alternative mode of acquisition in Chapter V of the Act. Under section 17 of the Act the Government may make an order directing that a record of rights be prepared in respect of districts, part of a district, or local area, or that the record of rights last prepared in respect of such district, part of a district, or local area be revised. When such record of rights is published, the revenue-officer is required by section 33 to prepare in the prescribed form and in the prescribed manner a compensation assessment - roll in which the gross assets and the net income of all rent-receivers within such district, part of a district, or local area and the compensation to be paid to all persons whose intersts are acquired, shall be specified. On the final publication of such assessment-roll, subject to certain exceptions, the interests of all the rent-receivers within the area to which such roll relates, including their interests in the lands in their *khas* possession, vest absolutely in the Government.[17]

It should be noted in this connection that the Government on the 2nd April, 1956, issued notifications districtwise purporting to acquire the interests of the rent-receivers under section 3(1) and lands in their *Khas* possession under section 3(2), with effect from the 14th April, 1956. The notifications of the 2nd April, 1956, were challenged in the case of *Jibendra Kishore Acharjya* v. *Province of East Pakistan*[18] wherein the High Court of East Pakistan delivered the judgment unanimously repelling all constitutional objections to the notifications. The Supreme Court of Pakistan upheld the judgment of the High Court of East Pakistan[19] and since then no question as regards the acquisition of interest of the rent-receivers was raised and the Government was, in pursuance of section 3 of the State

Acquisition and Tenancy Act, 1950, able to acquire all those interests of the rent-receivers which they could not retain in their *khas* possession under the provisions of the said Act.

The State Acquisition and Tenancy Act, 1950, may be regarded as "the most important agrarian legislation"[20] of Bangladesh because by that Act the *zamindary* system was abolished and the *raiyats* regained their ancient rights to hold land directly under the Government as they were under the Hindu and Muslim governments. They became the *Maliks* or proprietors of the holdings which are now heritable and transferable. Thus, the interests of the intermediate class in lands had been abolished and the ancient rights of the *raiyats* in lands have been re-established. However, after the emergence of Bangladesh in 1971, either some basic amendments have been made to the State Acquisition and Tenancy Act, 1950, or some new laws relating to land have been promulgated. In order to remove the hardship of the small farmers the State Acquisition and Tenancy (Third Amendment) Order, 1972 (P.O. 96 of 1972), was passed. According to the provisions of this Order where the total area of agricultural land held in Bangladesh by a family does not exceed twenty-five standard *bighas*, such family shall be exempted from payment of land revenue in respect of such lands with effect from the first *Baisakh* of 1379 B.S. (First day of Bengali year) or from such date as it may be entitled to such exemption under section 151-I, as the case may be.[21] Under the Bangladesh Land Holding (Limitation) Order, 1972 (P.O. 98 of 1972), the total quantity of land which may be held by a family in Bangladesh has been reduced to 100 standard *bighas*.[22] Recently the quantity of the land has been reduced to 60 standard *bighas*.[23]

2. LAW RELATING TO RECOVERY OF LAND REVENUE

The provisions for the recovery of public demands have been contained in the Public Demands Recovery Act, 1913 (Act III of 1913). The procedure for recovery of public demands may be summarised as follows: when a certificate - officer is satisfied that any public demand payable to the Collector is due, he may sign a certificate stating that the demand is due, and shall cause the certificate to be filed in his office.[24] Filing of certificate can be made on requisition.[25] When a certificate has been filed, the certificate - officer shall cause to be served upon the certificate-debtor a notice and a copy of the certificate.[26] From and after the service of notice of any certificate upon the certificate-debtor---(a) any private transfer or delivery of any of his immovable property situated in the district in which the certificate is filed, or of any interest in any such property, shall be void against any claim enforceable in execution of the certificate; and (b) the amount due from time to time in respect of the certificate shall be a charge upon the immovable property of the certificate-debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed.[27] The certificate-debtor may file petition denying liablity.[28]

A certificate may be executed by the certificate-officer in whose office the original certificate is filed or by the certificate-officer to whom a copy of the certificate is sent for execution.[29] A certificate-officer may order execution of a certificate by sale of any property or by attachment of any decree; or by arresting the certificate-debtor and detaining him in the civil prison.[30] There is procedure for setting aside sale.[31] The certificate–debtor may bring a suit in the civil court to have the certificate cancelled or modified on some specified grounds.[32]

The Public Demands Recovery Act, 1913, contains provisions for appeal, revision and review[33] to give relief to the aggrieved party.

3. NON-AGRARIAN LAW

The incidents of tenancies of non-agrarian land are governed by the Non-Agricultural Tenancy Act, 1949 (Act XXIII of 1949). The Act was brought into existence with the object of conferring a wide range of rights on non-agricultural tenants whom it intended to protect by raising a barrage of massive statutory rights.[34]

A non-agricultural tenant may hold non-agricultural land for homestead or residential purposes; manufacturing or business purposes; or religious or other purposes.[35] The incidents of tenancies held for not less than twelve years, including renewals and transfers thereof and succession thereto, are provided in sections 7 and 8. Incidents of tenancies held for more than a year but less than twelve years are provided in section 9. Under these three sections the ejectment of a tenant is not an easy affair as it was before.[36] Section 20 of the Act declares the grounds on which the under-tenant makes himself liable to be ejected; and section 21 provides the incidents of his tenancy, such as heritability, transferability and the section 22 confers certian privileges of tenants on a class of under-tenants of not less than 12 years standing or having other attributes.[37]

The transfer of non-agricultural land is compulsorily registerable irrespective of the value of such land.[38] A bequest or a sale in execution of decree or a of certificate signed under the Public Demands Recovery Act, 1913, are the execptions to this rule. Section 24 of the Act confers the right of pre-emption upon a co-sharer tenant when a portion or share of the non-agricultural land is transferred. The object of section 24 of the Act is to prevent non-agricultural land from being possessed by stranger purchasers if the other co-sharer tenants desire to have the same themselves.[39]

Under the Act, both the tenant and landlord have the rights to make improvement, but when both the tenant and the landlord wish to make the same improvements, the tenant will get the priority.[40] The Act declares that no non-agricultural tanant shall be ejected from the tenancy or from any non-agricultural land which he holds except in execution of a decree of a competent civil court.[41] Where a non-agricultural tenant has erected any structure on any non-agricultural land held by him and such land is sold in execution of a certificate for arrears of rent due in respect of such land, the purchaser shall be entitlled to obtain delivery of possession of the land sold by the removal of such structure.[42]

The Non-Agricultural Tenancy Act, 1949, is not a complete code. Sections 2 (8) and 71 of the Act establishes the connection of the Act with the Transfer of Property Act, 1882, and the State Acquisition and Tenancy Act, 1950. Many provisions of the Transfer of Property Act, 1882, and the State Acquisition and Tenancy Act, 1950, are applicable in the case of non-agricultural tenancies. So, the statement made in the Preamble to the Act is justified when it speaks that the Act intends to "make better provision relating to the law of landlord and tenant in respect of certain non-agricultural tenancies in Bangladesh."

Notes and References

1. See Preamble to the State Acquisition and Tenancy Act. 1950.
2. Scetion 3 (1) of State Acquisition and Tenancy Act. 1950.
3. Section 3 (2). *ibid.*
4. Section 20 (4), ***ibid.***
5. ***Ibid.***
6. Section 20 (4A). ***ibid.***
7. ***Ibid.***
8. Section 20 (5) (i) (b). ***ibid.***
9. See Section 3(4), 20(2)(b) and 20(2a). ***ibid.***
10. Section 3(4)(a). ***ibid.***
11. Section 3(4)(e). ***ibid.***
12. ***Lalita*** v. ***Rafique,*** 17 D.L.R. (1965) 107.
13. ***Rafiqul Islam*** v. ***Kazi Taibur Rahman,*** 18 D.L.R. (1966) 375.
14. Seciton 82(8) of the State Acquisition and Tenancy Act. 1950.
15. Section 3(4) (e). ***ibid.***
16. Section 3(5). ***ibid.***
17. Section 44. ***ibid.***
18. 9 D.L.R. (1957) 457.
19. See *Jibendra Kishore Acharjya* v. *Province of East Pakistan*. 9 D.L.R. (S.C.) (1957) 21.
20. Kabir, *Land Laws in East Pakistan* Vol. III (Dhaka: Law House. 1969) p.6.

21. New section 191C of the State Acquisition and Tenancy Act, 1950.
22. Section 3(a) of the Bangladesh Land Holding (Limitation) Order, 1972.
23. Section 4 of the Land Reforms Ordinance, 1984 (Ordinance X of 1984).
24. Section 4, *ibid.*
25. Section 6, *ibid.*
26. Section 7, *ibid.*
27. Section 8, *ibid.*
28. Section 9, *ibid.*
29. Section 11, *ibid.*
30. Section 14, *ibid.*
31. Sections 22-25, *ibid.*
32. Sections 34035, *ibid.*
33. Sections 51-54, *ibid.*
34. *Haji Akhtaruzzaman* v. *Jadu Nath Pal*, P.L.D. 1967, Dhaka 546.
35. Section 4 of the Non-Agricultural Tanancy Act, 1949.
36. *Krishna Ranjan Chowdhury* v. *Hem Chandra Chowdhury*, 9 D.L.R. (1957) 159; *Astaram Bagdi* v. *Sitanath Mondal*, (1955) 60 C.W.N. 109.
37. *Sarat Chandra* v. *Satish Chandra*, (1954)59 C.W.N. 434.
38. Section 23 of Non-Agricultural Tenancy Act, 1949.
39. *Shyamapada Bhattacharjee* v. *Satya Gopal Majumdar*, (1963) 67 C.W.N. 599.
40. Section 65 of the Non-Agricultural Tenancy Act, 1949.
41. Section 70, *ibid.*
42. Section 77, *ibid.*

CHAPTER VII

COMMERCIAL LAWS

1. LAW OF CONTRACT

The Contract Act. 1872 (Act IX of 1872). possesses the combined effect of common law and equity doctrine much simplified and altered in some particulars so as to accommodate it to the circumstances of Indian Sub-continent. Frederick Pollock went to the extent of saying: "the Indian Contract is in effect... a code of English Law."[1]

Section 2(h) of the Contract Act. 1872, defines a contract as "an agreement enforceable by law." In order to be enforceable the agreement must create an obligation on both the parties to the contract which law may justly step in to enforce whenever there is any default on the part of either. A contract is made by proposal and acceptance if the latter unconditionally corresponds with the former.

A contract is voidable at the option of a person whose consent has been secured by coercion. fraud, undue influence or misrepresentation.[2] An agreement by a person of unsound mind due to drunkenness is voidable.[3] Certain contracts by minors are voidable either during minority or within a reasonable time after the settlement of majority.[4]

A contract is void if its object or consideration is unlawful. fraudalent. immoral or opposed to public policy or if it was entered into under a mutual mistake of fact essential to the agreement.[5] Every agreement in restraint of the marriage of any person, other than the minor, is void.[6] Every agreement in restraint of a lawful profession, trade or business of any kind is void.[7] Agreements in restraint of judicial proceedings are void except those that provide for reference of disputes to application.[8] Uncertain contracts are void.[9] Agreement by way of wager in void.[10]

A contract is dissolved——by performing respective shares of the promises; or by fresh agrêement between the same parties to the contract; or by supervening impossibility; or by operation of law.[11] When a contract is dissolved the party affacted by it has the following remedies: damages, specific performance, *quantum meruit*, or injunction.[12]

The contract Act, 1872, deals with the law of agency. An agent who authorised to do a particular act has authority to do every lawful thing which is necessary in order to do such an act.[13] When an emergency arises an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances.[14] An agent cannot appoint a sub-agent. But he can appoint a sub-agent where it is the usual custom of the trade in question or where without such a sub-agent the assignment cannot be properly executed or where the principal has authorised the appointment of a sub-agent.[15]

The Contract Act, 1872, also deals with bailment. Bailment is the delivery of goods to the bailee to be returned to the bailor or disposed of in accordance with his directions when the purpose of bailment is accomplished.[16] The bailor is bound to disclose to the bailee faults in the goods bailed of which he is aware and which materially interferes with the use of them or exposes the bailee to extraordinary risks.[17] If the bailee makes any unauthorised use of the goods bailed, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.[18] The bailee is bound to return, deliver or tender the goods bailed at the proper time: if he fails, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.[19]

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself. or by the conduct of any other person is called a contract of indemnity.[20] A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in the case of his default.[21]

There are the laws with which the Contract Act, 1872, deals. The laws of contract are mainly part of civil law and are used for commercial and business purposes. hence, it comes under the purview of the commercial law.

2. LAW OF PARTNERSHIP

The Partnership Act, 1932(Act IX of 1932), is based on the English Partnership Act, 1890 (53 & 54, Vic. C. 39). Prior to 1932 the law relating to partnership was contained in Chapter XI of the Contract Act, 1872, which was "based on the rules included in the Report of the Indian Law Commission presided over by Lord Romilly in 1886"[22] and which was held to be not exhaustive by the Privy Council as well as the High Court of Madras.[23] In order to remove the shortcomings Chapter XI of the Contract Act was repealed and the Partnership Act, 1932. was passed.

Section 4 of the Partnership Act, 1932, defines partnership as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all." Since the relation of partnership is created by contract the mutual rights and liabilities of the partners may be wholly governed by the terms of the agreement of partnership.

Under section 12 of the Act; subject ot the contract, every partner has the right to take part in the conduct of the business of the firm: to inspect the books of the firm: and to express an opinion on any matter connected with the business though the decision must be that of the majority.[24] Subject to the contract, a partner is entitled to an equal share in the profits earned and interest on the capital subscribed by him: but not other remuneration.[25] Every partner has to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.[26] On the contrary, the firm is liable for the wrongful act or omission of a partner acting in the ordinary course of business of the firm. But without the express authority the partner cannot----submit a dispute relating to the business of the firm to arbitration; open a banking account on behalf of the firm in his own name; withdraw a suit or proceeding filed on behalf of the firm; deal with immovable property of the firm.[27]

A minor cannot be a partner in a firm because he has no contractual capacity----but he may be admitted to the benefit of partnership.[28] Such a minor is not personally liable for the acts of the firm but his share is liable for such acts.[29] Within six months of attaining majority or of knowledge of his relation with the firm, whichever is later, he may give notice of his election to become a partner; if he fails to do so, he becomes partner automatically.[30]

The partnership Act. 1932. provides that person shall not be introduced as a partner into a firm without the consent of all the existing partners.[31] A partner may retire——with the consent of all other partners in accordance with an express agreement by the partners: by giving notice in writing to all partners of his intention to retire if the partnership is at will.[32] No majority of partners can expel a partner unless such power is conferred by contract between the partners, and the power is exercised in good faith.[33] A partner ceases to be a partner as soon as he is adjudged as insolvent.[34] Unless otherwise provided by the contract of partnership. the death of a partner has the effect of dissolving the partnership.[35] .

A firm is dissolved——as a result of any agreement between all the partners[36] by the happening of any event which makes the business of the firm unlawful.[37] on the happening of certain contingencies such as efflux of time. death of a partner. insolvency of a partner.[38] and by the intervention of the court.[39] On the dissolution of a firm every partner or his reprsentative is entitled to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.[40].

In this way the Partnership Act. 1932. "makes considerable changes in definition and arrangement" and "gives effect... to the mercantile view of a firm's continuity."[41]

3. LAW OF SALE OF GOODS

The Sale of Goods Act. 1930(Act III 1930). is based on the English Sale of Goods Act. 1893 (56 and 57 Vict. C. 71). which is characterised as "a very successful and correct codification of this branch of the mercantile law."[42] Though Sale of Goods Act, 1930, is said to "restate minutely and full what had been enacted by the English Sale of Goods Act of 1893", [43] but there are some provisions which are different in some respects from those in force in England. The Sale of Goods Act repealed chapter VII of the Contract Act, 1872, which were adequate for their time, but needed amendment as" a result of the development of modern commerce."[44]

Section 4(1) of the Sale of Goods Act, 1930, defines a contract of sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." In this context the view of Lord Alfred Denning M.R. may be mentioned. His lordship held: "the word 'sale' property cannotes the transfer of the absolute or general property in a thing for a price in monoy."[45]

A contract of sale may contain condition or warranty. A condition is a stipulation essential to the main prupose of the contract, the breach of which gives rise to a right to repudiate the contract.[46] A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for demages but not a right to reject the goods or to repudiate the contract.[47]

There is a general proposition that no one can give that he has not got (*nemo dat quod non habet*) which has been provided in section 27 of the Sale of Goods Act, 1930. Under this section where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. There are certain exceptions to this rule: (1) *estoppel* :- Where the owner of the goods is by his conduct precluded from denying the seller's authority to sell:[48]

(2) *sale by mercantile agent*——where he sells under the authority or with the consent of the owner;[49] (3) *sale by one of joint owners*——where a person buys in good faith goods from one of the several joint owners who has the sole possession of them and the buyer has not at the time of the contract of sale notice that the seller has no authority to sell;[50] (4) *sale by person in possession under voidable contract*---where a person buys goods in good faith and without notice of the seller's defect of titles from a person who has obtained possession thereof under a voidable contract but the contract has not yet been rescinded.[51]

In accordance with the terms of the contract of sale it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them.[52] Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if he accepts the goods so delivered he has to pay for them at the contract rate.[53] In the case of excess delivery, the buyer may reject the whole or the excess, but if he accepts the whole he must pay at the contract rate.[54]

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract and the seller is bound to afford to the buyer a reasonable opportunity of examining the goods.[55] If the buyer does not examine the goods in spite of reasonable opportunity being given by the seller, the buyer is deemed to have accepted the goods.

An unpaid seller may retain the goods in his possession until he is paid.[56] He has the right of stopping the goods in transit after he has parted with the possession of the goods.[57] He has the right to re-sell the goods in some specific cases.[58]

where the property has passed to the buyer and the buyer wrongfully neglects or refuses to pay, he may be sued.[59] Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.[60] Where there is a breach of warranty by the seller, the buyer may——set up against the seller the breach of warranty in diminution or extinction of the price, or sue the seller for damages for breach of warranty.[61]

4. LAW OF NEGOTIABLE INSTRUMENT

In Indian Sub-continent the Negotiable Instruments Act, 1881(Act XXVI of 1881), was the first enactment to define clearly the rules relating to bills of exchange, promisory notes and cheques. The Act is mere "the codification of the English law with minor changes."[62] Section 13 of the Act describes that "a negotiable instrument means a promisory note, bill of exchange or cheque payable either to order or to bear". The Act does not defines negotiable instruments but only describes as to what the term includes.

A promisory note is defined as an instrument not being a bank note or currency note, containing an unconditional undertaking signed by the maker, to pay on demand or at a fixed or determinable future date a certain sum of money to or to the order of a certain person or to the bearer of the instrument.[63] A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.[64] A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.[65]

When a promisory note, bill of exchange or cheque is transfered to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.[66] If an instrument is payable to bearer, it can be negotiated by mere delivery.[67] When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the indorser.[68]

The holder of a promissory note, bill of exchage or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.[69] Where the promissory note, bill or chaque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.[70] Any person who, for consideration, becomes possessor of a negotiable instrument payable to bearer is known as a holder in due course of such instrument provided he comes into possession before the amount payable is due and he has no notice of any defect in the title of the person from whom he derives his title.[71]

Section 26 of the Negotiable Instruments Act, 1881, lays downs that every person capable of contracting according to the law to which he is subject may be a party to a negotiable instrument. Under this section read with section 11 of the Contract Act, 1872, the following persons are disqualified to be parties to a negotiable instrument: (a) minors; (b) persons of unsound mind by reason of lunacy, idiocy, intoxication; (c) alien enemies; and (d) persens declared disqualified by any other law.

If minor draws or negotiates an instrument the transferee can enforce it against any party other than the minor. A partner, if acts in the name of the firm, binds the firm by making or dealing with an instrument to the extent authorised by the Partnership Act, 1932.

A negotiable instrument is said to be dishonoured when the drawee either refuses to accept it or to make payment upon it. Dishonour, gives rise to cause of action for suit against the drawer or previous holders. If an instrument has been lost or obtained by means of an offence or fraud or unlawful consideration, the person who finds it, or so obtains it and any person claiming under him cannot claim payment, unless he is a holder in due course.[72]

5. COMPANY LAW

The Companies Act, 1913 (Act VII of 1913), is almost *verbatim* reproduction of the English Companies (Consolidation) Act, 1908.[73] A company formed or registered under this Act is a distinct legal entity.[74] It can own and deal with property, sue and be sued in its own name, contract on its own behalf and the members are not personally entitled to the benefits or liable for the burdens arising therefrom. Once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant.[75]

Two persons may form a private company but number of members will not exceed fifty.[76] There is no limitation as to the membership of a public company, minimum number being seven. The first stage of formation of a company is that a few people known as promoters get together to bring it into existent for the purpose of carrying on a lawful joint-stock business.

The next stage, the promoters, having decided to form a company, must fix up five things: (a) the objects of the company; (b) the name of the company; (c) the place where the business of the company is to be carried on; (d) liability of the members; and (e) the amount of capital necessary for the business to be carried on successfully. The decisions of the promoters on these five points are recorded in a document called the *memorandum* of association.[77]

In the third stage, the promoters have to decide upon the manner of carrying on the business of the company. This calls for the appointment of directors of the company, the division and allotment of shares, meetings of shareholders and such other things as are necessary for the internal administration of the company. This arrangement are expressed in a document called the articles of association.[78] The articles of association are subordinate to the *memorandum* of association. Any clause in the former at variance with the latter is to that extent inoperative.[79]

In the fourth stage, the promoters have to submit to the Registrar of Joint-Stock Companies information regarding the *memorundum*, the articles, the names with address of the directors and so on for the purpse of the company's incorporation and thus get it registered.[80]

In the fifth stage, after the company has been incorporated by registration it becomes a legal person distinct from its members. A private company can commence business as soon as it is registered. But a public company has to pass through certain preliminary formalities before its business can be commenced.[81]

For the purpose of managing the business of the company directors are elected by the shareholders from among themselves. The Companies Act, 1913, requires that every public company shall have at least three directors.[82] This rule does not apply to private company except where a private company is a subsidiary company of a public company.[83] "The true position of directors seems to be that of agents for the company with powers and duties of carrying on the whole of its business subject to the restrictions imposed by the articles and the statutory provision."[84]

One of the peculiar feature of the Companies Act, 1913, was the introduction of managing agent in the management of the company. Managing agent means a person, firm or company entitled to the mnagement with the company and under such control and direction of the directors as may be provided for the agreement. Thus, if the agreement so provides, a managing agent may be almost free from the control and direction of the directors.[85]

The Companies Act, 1913, has laid down three modes of winding up of a company : (a) winding up by the court; (b) voluntary winding up; and (c) winding up subject to the supervision of the court.[86] In the case of winding up of a company the court has a great role to play. It should be noted in this connection that the court herein means the High Court Division of the Supreme Court of Bangladesh because under section 3 of the Companies Act only this said Division has jurisdiction over company matters.

6. LABOUR LAWS

In Bangladesh there are many laws relating to to the labours. Among them some important laws such as the Workmen's Compensation Act, 1923 (Act VIII of 1923), the Factories Act, 1965 (Act XII of 1965), and the Industrial Relations Ordinance, 1969 (Ordinance XXIII of 1969), have been discussed as follow:

Under the provision of section 3(1) of the Workmen's Compensation Act, 1923(Act VIII of 1923), the employer is liable to pay compensation for injury caused to a workman by accident arising out of or in the course of his employment. The contacting of some occupational diseases peculiar to the nature of the work done is also considered an injury by accident arising out of or in the course of employment.[87] The employer is not liable to pay compensation in respect of any injury which does not cause total or partial disablement of the workman for more than four days. He is also not liable in respect of any injury, not resulting in death, caused by an accident which is directly attributable to the workman being under the influence of drink or to the wilful disobedience of the workman to any order expressly given for the purpose of securing safety or the wilful removal or disregard by the workman of a safety device.[88]

The Factories Act, 1965, applies to the factories employing ten or more workers for the purpose of carrying on manufacturing process with or without the aid of power, but does not include a mine subject to the operation of the Mines Act, 1923(Act IV of 1923).[89] The Act provides that no adult worker should work in a factory for more than 48 hours in a week.[90] The working hours of the adult workers should not exceed nine per day in a factory.[91] A male adult worker in a seasonal factory may work for ten hours in any day.[92] A woman worker shall not be allowed to work in a factory except between 7 a.m. and 8 p.m. [93]

Children under the age of 14 years are not allowed to work in a factory.[94] A child between the age of 14 and 18 years shall work in a factory if certified by Certifying Surgeons as physically fit.[95] The working hours of children are limited to -- five hours per day,[96] and two shifts which shall not overlap or spread over more than seven and a half hours.[97] Beside these, the Facrtory Act, 1965, has made ample provisions for health and hygiene, safety and welfare of the workers.[98]

The Industrial Relations Ordinance, 1969, consolidates the formation of trade unions and settlement of disputes between employers and workmen. The Act provides that the workers shall have the right to establish and to join associations of their own choosing without previous authorisation.[99] The employers shall have the right to establish and to join associations of their own choosing without previous authorisation.[1] The Tarde union and the employers' association shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. [2] The trade union must be registered.[3] Where there is only one registered trade union in an establishment or a group of establishments, that trade union shall be deemed to be coollective bargaining agent for such establishment or group.[4]

If any industrial dispute is likely to arise between the employer and any of the workmen, the parties to the dispute tries to reach a settlement by negotiation; if the negotiation fails the conciliator will be requested in writing to conciliate in the dispute. If the conciliator fails to settle the dispute within ten days, the collective bargaining agent or the employer serves on the other party to the dispute twenty-one days' notice of strike or lock-out, as the case may be.[5] If the conciliation fails,the conciliator shall try to persuade the parties to agree to refer the dispute to an arbitrator[6] whose award shall be final and no appeal shall lie against it.[7] If no settlement is arrived at during the course of conciliation proceedings and the parties to the dispute do not agree to refer it to an arbitrator, the workmen may go on strike or, as the case may be, the employer may declare a lock-out.[8]

The parties to the dispute may, at any time, make a joint application for adjudication of the dispute to the Labour Court which consists of a Chairman appointed by the Government and two members, one to represent the employers and the other to represent the workmen.[9] The Labour Court shall make such award as it deems fit as expeditiously as possible.[10] Any collective bargaining agent or any employer or workman may apply to the Labour Court for the enforcement of any right guaranteed to it or him by or under any law or award or settlement.[11] Any decision of the Labour Court shall be final and shall not be called in question by any court or authority.[12] But against the award of the Labour Court appeal shall lie to the Labour Appellate Tribunal consisting of one member who is or has been a Judge or an Additional Judge of the High Court Division of the Supreme Court.[13]

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18. Section 154. *ibid*.
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32. Section 3P(1), *ibid.*
33. Section 33, *ibid.*
34. Section 34, *ibid.*
35. Section 35, *ibid.*
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42. *The Parchim*, 1918 A.C. 157, per Lord Parker at pp. 160-161.
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47. Section 12(3), *ibid.*
48. Section 27, *ibid.*
49. Proviso to section 27, *ibid.*
50. Section 28, *ibid.*
51. Section 29, *ibid.*
52. Section 31, *ibid.*
53. Section 57(1), *ibid.*

54. Section 37(2), *ibid*.
55. Section 41(1), *ibid*.
56. Section 41(1), *ibid*.
56. Section 46(1)(a), *ibid*.
57. Section 50, *ibid*.
58. Section 46(1)(c), *ibid*.
59. Section 55(1), *ibid*.
60. Section 56, *ibid*.
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62. M.C. Setalvad, *op.cit.*, at p. 97.
63. Section 4 of the Negotiable Instruments Act, 1881.
64. Section 5, *ibid*.
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86. Section 155, ***ibid.***
87. Section 3(2) of the Workmen's Compensation Act, 1923.
88. Proviso to secion 3(1), ***ibid.***
89. Section 2(f) of the Factories Act, 1965.
90. Section 50(1), ***ibid.***
91. Section 50(2), *ibid.*
92. Section 53, ***ibid.***
93. Section 65(1)(a), ***ibid.***
94. Section 66, ***ibid.***
95. Sectionn 67 and 68, ***ibid.***
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99. Section 3(a) of the Industrial Relations Ordinance, 1969.
1. Section 3(b), ***ibid.***
3. Section 5-8, ***ibid.***
4. Seciton 22, ***ibid.***
5. Section 28, *ibid.*
6. Section 31(1), ***ibid.***

7. Section 31(5), ***ibid.***
8. Section 32(1), ***ibid.***
9. Sections 32(1A) and 35(2), ***ibid.***
10. Section 32(4), ***ibid.***
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13. Sections 38(3), 38(1) and 38(2), ***ibid.***

CHAPTER VIII

CRIMINAL PROCEDURE AND LAW

1. LAW OF CRIMINAL PROCEDURE

Laws relating to criminal procedure has been contained in the Code of Criminal Procedure, 1898(Act V of 1898). The Code specifies the classes of the courts and their jurisdictions in which offenders may be prosecuted and prescribes the procedure which is to be followed by the various criminal courts in an enquiry, trial or any other proceeding.

Under the Code besides the Supreme Court, there are five classes of criminal courts in Bangladesh, namely, Courts of Session; Metropolitan Magistrates; Magistrates of the first class; Magistrates of the second class; Magistrates of the third class.[1] The government shall establish a Court of Session for every sessions division, and appoint a judge of such Court; and the Court of Session for a Metropolitan area shall be called the Metropolitan Court of Session.[2] In every district outside a Metropolitan area the government shall appoint a Magistrate of the first class who shall be called the District Magistrate.[3] The government may place any Magisterate of the first class or second class in a *upazilla* and such Magistrate shall be called the *Upazilla* Magistrate.[4]

Cases may be started before the criminal courts either on reports made by the police or on complaints lodged by private persons. The Code not only gives the rights to make complaints to private persons but it makes it incumbent on the public to give information to the police of the commission or the intended commission of certain offences.[5] The duty of aiding Magistrate and police officer in making arrest and in preventing certain offences is also laid on the public.[6] The Code also entitles private persons to arrest persons in certain cases and make over persons so arrested without unnecessary delay to a police officer.[7] The law enjoins all persons to attend before Magistrates and police officers to give evidence about the commission of offences within their cognizance whenever called upon to do so.[8]

Offences in Bangladesh are either non-cognizable in which case a complaint to a Magistrate is normally the only way in which an inquiry into them can be started, or cognizable, in which case it is possible to set the machinery of law in motion by reporting the matter to a police station for the police have a duty to investigate cognizable cases, and power to arrest without warrant any person reasonably suspected of having concerned in a cognizable offence.[9] In such cases the investigation results in a police report upon which proceedings in respect of the offence are initiated before a Magistrate.

The manner of trial of offences varies according to the seriousness of the offence. The more serious the offence the greater the elaborateness of the procedure. No sentence of imprisonment exceeding three months can be passed in cases tried in a summary manner.[10] Offence which merit a severer punishment are tried as warrant cases[11] with a more detailed procedure. Offences of a still graver nature can only be tried by a Court of session or the High Court Division of the Supreme Court and a special procedure is provided.[12]

The Code of Criminal procedure, 1898, provides for appeal to the higher criminal court from the judgment or order of a lower criminal court.[13] The higher criminal court has the power to call for records of inferior courts in some specified cases.[14] The High Court Division of the Supreme Court has the power of revision in some specified cases.[15] The said Division has the inherent power to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice.[16]

Before closing the discussion a few words as regards granting of bail may be pointed out. The Code provides that when any person other than a person accused of a non-bailable offence or the person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a court may be released on bail: but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life.[17] The court is empowered to direct that any person under the age of sixteen years or any women or any sick or infirm person accused of such an offence be released on bail.[18] The court has also the discretion to give bail to the accused at any stage of the investigation, inquiry or trial of the case.[19]

2. SUBSTANTIVE CRIMINAL LAW

The Penal Code, 1860(Act XLV of 1860), is universally acknowledged to be a monument of codification and everlasting memorial to the high juristic attainments of its distinguished author,[20] Lord Macaulay. The Code deals with substantive crimes and their punishments. It provides that all persons irrespective of rank, nationality, caste or creed, are equally liable for offence committed within Bangladesh.[21]

Under the Code the punishments to which the offenders are liable are: death; transportation; imprisonment -- rigorous and simple; forfeiture of property; and fine.[22]

The Code provides that when a criminal act done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.[23] All members of an unlawful assembly are liable for a crime committed by one of them in prosecution of the common object.[24]

The general exceptions in this Code by and large include most of the familiar exemptions from liability known to common law[25] such as mistake, ignorance, accident and consent and also the heads of want of criminal capacity like infancy, insanity, drunkenness and coercion.[26] The right of private defence may be exercised to forestall offences against the body, theft, robbery, mischief and criminal trespass, even when directed against the person or property of another.[27]

Homicide is murder, punishable with death or transportation for life, on proof of an intention to cause death or an injury sufficient in the ordinary course of nature to cause the death of an average man, or if the victim is subject to a physical infirmity known to the offender, an injury likely to cause the death of that person.[28] If the fatal injury is caused on grave and sudden provocation or in a sudden fight on equal terms, the crime is culpable homicide, punishable with transportation for life, or imprisonemnt for not more than ten years.[29]

Wrongful restraint is abstructing a person from proceeding in a direction in which he has a right to go [30]: if the restriction covers all directions, it is a wrongful confinement.[31] Taking a male under fourteen or a female under sixteen out of the keeping of any person lawfully entrusted with the child's custody is kidnapping[32] Whoever by force compels, or by deceitful means induces, any person to go from any place, is said to abduct that person.[33]

The best Chapter in the Code deals with offences against property.[34] Theft is moving property with intent to dishonestly to take it out of the possession of another without his consent.[35] Extortion is inducing a person to part with property by threat of any harm, not necessarily to the victims, in mind, body, reputation or property.[36] Theft becomes robbery if in order to take or carry away the property, the theft causes hurt or wrongful restraint or threatens instant hurt or wrongful restraint.[37] Extortion is robbery if the offender is in the immediate presence of his victim, and threatens instant hurt or wrongful restraint.[38] If the persons, present and aiding when robbery is done or attempted, are five or more in number, the offence is dacoity.[39]

Criminal misappropriation is committed whenever a person dishonestly converts to his own use any movable property.[40] Criminal breach of trust is dishonestly misappropriating or converting to one's own use property entrusted to one or dishonestly disposing of it in violation of the terms on which it was received or any provision of law.[41] Cheating is fraudalently or dishonestly inducing a person to deliver property or consent that another shall retain property.[42] Criminal Trespass is entering on another's property with intent to commit an offence or intimidate, insult or annoy the person in possession.[43] If the property is a building, tent or vessel, used as a human dwelling or for worship or the custody of property, the offence is house-trespass.[44]

Offences against the State include waging war, attempting to wage war, abetting waging of war against the State, all of which are punishable with death or transportation for life.[45]Conspiracy to do any of these things and collecting men, arms or ammunition in preparation are punishable with transportion for life or imprisonment which may extend to ten years.[46]

Any act which causes or must necessarily cause common injury, danger or annoyance to the people living or cocupying property in the vicinity, or people who may have occasion to exercise a public right is a public nuisance and punishable with fine or imprisonment.[47] Adulterating food, drink or drugs and knowingly selling such articles are crimes.[48] Negligently driving a vehicle on a public way, negligently navigating a vessel and conveying passengers in an unsafe or over-loaded vessel, whether knowingly or negligently are offences.[49]

Defamation is the publication of any imputation concerning another having reason to believe that it will harm his reputation by lowering, in the estimate of others, his moral or intellectual character or his character in respect of his caste or calling or by lowering his credit or by suggesting that his body is in a loathsome or disgraceful state.[50]

Among the offences relating to marriage, bigamy is only an offence if a person goes through the necessary ceremony for a marriage, when it is void by that person's personal law, because he or she has a spouse living.[51] Another offence in the same Chapter is inducing a woman to cohabit by falsely representing that she is married to the offender.[52] Fraudalently going through ceremony, knowing that it does not create a valid marriage, and sexual intercourse with a woman who is and whom the offender has reason to believe to be, the wife of another, are crimes under the Code.[53] So also in the taking a married woman from the person in lawful charge of her with intent that she *may have* illicit intercourse.[54]

3. LAW OF EVIDENCE

The Evidence Act, 1872 (Act I of 1872), which is applicable in civil and criminal cases, was passed in order to consolidate, define and amend the law of evidence. This Act is "a unique piece of legislation the like of which is not to be found anywhere else in the world. In the symmetry of its structure, in the clearness and fullness of its outline, in the terseness of its expressions, and in the compactness of its subject matter, the work stands out unrivalled and unparalleled."[55]

Part I of the Evidence Act, 1872, deals with what facts may and what facts may not be proved in civil suits or criminal cases. Evidence may be given of facts in issue and relevant facts.[56] Admission is a statement, oral or documentary, which susggests any inference as to any fact in issue or relevant fact.[57] A confession made by an accused person is irrelevant in an original proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise.[58] A confession made to a police officer shall not be proved against a person accused of any offence.[59] Statements or relevant facts made by a person who is dead, or who cannot be found, etc. are themselves relevant facts in some stated circumstances.[60] Opinions of experts in foreign law, science, or art are admissible when the court has to form an opinion on the matters in which they are experts.[61] The existence of a judgment, decree or order of any court is a relevant fact.[62] Character is relevant in some stated circumstances.[63]

Part II deals with proof, some facts need not be proved at all, because the court will take judicial notice of them, if they are relevant to the issue.[64] But where a fact requires proof, the rule is that it must be proved either by oral evidence or by documentary evidence. All facts, except the contents of documents, may be proved by oral evidence.[65] Oral evidence must in every case be direct.[66] Documentary evidence is either primary or secondary.[67] Primary evidence means the document itself produced for the inspection of the court.[68] Secondary evidence is admissible when the original is in the possession of the party agaisnt whom it is to be proved or of a person not obliged to prduce it or who does not procuce it after being given notice; it may be given when the original is lost or destroyed or when the original is a public document.[69]

part III deals with production and effect of evidence. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. [70] The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.[71] But the burdon of proof as to any particular fact lies on that person who wishes the court to believe in its existence.[72] The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.[73]

Estoppel prevents a party who has intentionally cause another to believe a thing to be true and to act on it, from denying the truth of that thing in eivil proceedings between them.[74]

A witness shall be first examined-in-chief, then if the adverse party so desires cross-examined.[75] Leading question, a question suggesting the answer expected, may be asked in cross examination.[76] Witnesses to character may be cross examined and re-examined.[77] The credit of a witness may be impeached in some specific ways by the adverse party, or with the consent of the court by the party who calls him.[78] The Judge may in order to discover or to obtain proper proof of relevant facts, ask any question he pleases to any witness and may order the production of any document or thing; but he must base his statement on facts declared by this Act to be relevant.[79]

The Evidence Act, 1872, concludes with the following words: "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if . . . there was sufficient evidence to justify the decision or . . . if the rejected evidence had been received, it ought not to have varied the decision."[80] This implies that an objection to the improper admission of evidence is material only if it can be shown that the exclusion of evidence improperly admitted is fatal to the decision.

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3. Section 10(1), *ibid.*
4. Section 13A(1), *ibid.*
5. Section 44,, *ibid.*
6. Section 42, *ibid.*
7. Section 59, *ibid.*
8. Sections 90 and 160, *ibid.*

9. Sections 149-153. *ibid.*
10. Sections 260-164. *ibid.*
11. 'Warrant case' means a case relating to an offence punishable with death, transportation or imprisonment for a term of not less than two years." Section 4(w) of the Code of Criminal Procedure, 1898.
12. Section 265A-265L, *ibid.*
13. Sections 404-431, *ibid.*
14. Section 435, *ibid.*
15. Section 439, *ibid.*
16. Section 561A, *ibid.*
17. Sections 496 and 497(1), *ibid*
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19. Section 497(2), *ibid.*
20. L. Kabir, *Lectures on the Pakistan Penal Code with Leading Cases*, (Dhaka : Law House Publication, 1970) pp. 5-6.
21. *Ibid.*, at p. 23; section 2 of the Penal Code, 1860.
22. Section 53, *ibid.*
23. Section 34, *ibid; Barendra Kumar Ghose* v. *King Emperor*, 52 I.A. 40; *Mahbub Shah v. King Emperor*, 72 I.A. 148.
24. Section 149 of the Penal Code, 1860; *Rahman Sardar* v. *Crown*, 7 D.L.R. (1955)572; *Janab Ali* v. *State*, 12 D.L.R. (1960) 808.
25. M.C. Setalvad, *supra*., at p. 142.
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27. Sections 96-106, *ibid. State* v. *Manzoor*, 18 D.L.R. (S.C.) (1966) 444; *Sultan Muhammad* v. *Crown*, P.L.D. 1955, Lahore 575.
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30. Section 339 of the Penal Code, 1960.
31. Section 342, *ibid*.
32. Section 361, *ibid*.
33. Section 362m, *ibid*.
34. Alan Gledhill, *supra*., at p. 268.
35. Section 378 of the Penal Code, 1860.
36. Section 383, *ibid*.
37. Section 390, *ibid*.
38. *Ibid*.
39. Section 391, *ibid*.
40. Section 403, *ibid*.
41. Section 405, *ibid*.
42. Section 415, *ibid*.
43. Section 441, *ibid*.
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45. Section 221, *ibid*.
46. Sections 221A and 222, *ibid*.
47. Section 268, *ibid*.
48. Sections 272-276, *ibid*.
49. Sections 279-282, *ibid*.

50. Section 499. ibid.

51. Sections 494-495, *ibid.*

52. Section 493, ibid.

53. Sections 496-497, *ibid.*

54. Section 498. ibid

55. M. Monir, *Principles and Digest of the Law of Evidence* (Allahabad : University Book Agency, 1986) **Vol. I, p.** XXIII

56. Section 3 of the Evidence Act, 1872.

57. Section 17, *ibid.*

58. Section 25, *ibid.*

59. Section 25, *ibid.*

60. Section 32, *ibid.*; *Khushal Rao v. State of Bombay*, 1958 S.C.R. 552.

61. Section 45 of the Evidence Act, 1872.

63. Sections 53-55, *ibid.*

64. Section 56, *ibid.*

65. Section 59, *ibid.*

66. Section 60, *ibid.*

67. Section 61, *ibid.*

68. Section 62, *ibid.*

69. Section 65, *ibid.*

70. Section 101, *ibid.*

71. Section 102, *ibid.*

72. Section 103, *ibid.*; *Muhammad Zaker v. Mastanser*, P.L.D. 1961 Dhaka 1.

73. Section 114, *ibid.; Haridas Chatterjee* v. *Manmatha Nath Mullick,* 160 I.C. 332.
74. Section 115 of the Evidence Act, 1872; *Lal Khan* v. *Allah Ditta,* P.L.D. 1950 Lahore 196.
75. Section 138 of the Evidence Act, 1872.
76. Sections 141 and 143, *ibid.*
77. Section 140, *ibid.*
78. Section 155, *ibid.*
79. Section 165, *ibid.*
80. Section 167, *ibid.*

CHAPTER IX

LEGAL EDUCATION, PROFESSION AND INSTITUTION

1. EDUCATIONAL INSTITUTIONS AND DEGREES

In Bangladesh legal education is imparted to the students/scholars in the Faculty of Law, University of Dhaka, in the Faculty of Law, University of Rajshahi, in the Institute of Bangladesh Studies, University of Rajshahi, and in the Faculty of *Sharia*, Islamic University. Besides these institutions, legal education is imparted in the different law colleges which are affiliated to the University of Dhaka, University of Rajshahi and University of Chittagong. In all these institutions the following degrees are awarded to the students/scholars after successfully completing the courses:

(a) **Bachelor of Law (Honours)**:- 4 years undergraduate Bachelor of Law (Honours) course has been introduced in the Department of Law which is under the Faculty of Law, University of Dhaka, and in the Department of Law which is under the Faculty of Law, University of Rajshahi and in the Department of *Sharia* which is under the Faculty of *Sharia*.. In this Honours course as per recommendation of the Legal Education Committee of the Bangladesh Bar Council the major laws are taught such as Jurisprudence, Roman Law, Personal Law (Muslim Law and Hindu Law), Equity, Tort, Constitutional Law, Criminology, Civil Laws, Labour Law, Criminal Law, Law of Evidence, Land Law, International Law etc. Annual Course system has been introduced in which at the end of each academic year course final examination is held. Gradation of the merits of the students are evaluated and divided into three classes: first class who obtain 60% marks in average: second class who obtain 45% marks in average: third class who obtain 36% marks in average.

(b) Bachelor of Law :- two years post-graduate Bachelor of law course has been introduced in the different law colleges which are affiliated to the University of Dhaka, University of Rajshahi or University of Chittagong on the territorial basis. The *curriculum*, the examination and all the academic matters are conducted by the Faculty concerned. The syllabus of the course is more or less same as prevalent in the Bachelor of Law (Honours) course; but the technical difference is that, in the case of Bachelor of Law, course has to be completed within two years. Annual written examination is held at the end of each academic session. Gradation of the merits of the students are evaluated in the same manner as the merits of the students of the Honours course are evaluated.

(c) Master of Law :- Master of Law course is taught in the Departments of law, Universities of Dhaka and Rajshahi. In the Department of law, University of Dhaka, two LL.M. courses have been introduced: Course-A and Course-B. The duration of Course-A is one year which is meant for the students who have successfully completed Bachelor of Law (Honours) course. Annual written examination is held at the end of academic session. The duration of Course-B is two years which is meant for the students who have successfully completed Bachelor of Law course with at least 45% marks in average. The students of Course-B need not attend the classes—only registration [illegible] sufficient to appear at the examination and preparation of the dissertation for the award of the degree. Gradation of the merits of the students of Course-A and Course-B are evaluated in the same manner as the merits of the students of the Honours course are evaluated.

In the Department of Law, University of Rajshahi, two Master of Law courses have been prevalent: Master of Law, Part I and master of Law Final. One year Master of Law Part I is meant for the students who successfully completed Bachelor of Law course; and one year Master of Law Final course is meant for the students who have successfully completed Bachelor of Law (Honours) course or master of Law Part I course. The final position is that those students who have completed Bachelor of Law course are to require two years and those students who have completed Bachelor of Law (Honours) course are to require one year for obtaining Master of Law degree.

(d) **Master of Philosophy** : Two years Master of Philosophy in Law course has been in existance in the Factulty of Law, University of Dhaka, in the Faculty of Law, University of Rajshahi, and in the Institute of Bangladesh Studies, University of Rajshahi. In the case of Factulty of Law, University of Dhaka, the research scholar has to complete in the first year course work and to pass written examination; and in the second year he has to write dissertation duly approved by the authority of the University. In the case of the Institute of Bangladesh Studies the research scholar has to complete in the first year inter-disciplinary course work and in the second year he has to write independent thesis duly approved by the authority of the University. In the case of Faculty of Law, Rajshahi University, the research scholar has only to write a thesis duly approved by the authority of the University.

(e) Doctor of Philosophy : Two years Doctor of Philosophy in law course is prevalent in the Faculty of Law, University of Dhaka, in the Faculty of Law, University of Rajshahi, and in the Institute of Bangladesh Studies, University of Rajshahi. The degree is awarded to a scholar who has earned his distinction by writing a thesis duly approved by the authority of the University concerned.

(f) Doctor of Law :- Two years Doctor of Law course is in existence in the Faculty of Law, University of Dhaka. The research scholar must have general knowledge in every branch of laws of Bangladesh. He is to write a thesis which distinctively contributes to the existing literature of law.

2. LEGAL PROFESSION

The procedure for practising the profession of law has been contained in the Bangladesh Legal Practitioners and Bar Council Order, 1972 (Order XLVI of 1972). The said Order provides that no person shall be entitled to practise the profession of law unless he is an advocate.[1] A person shall be qualified to be admitted as advocate if he fulfils the following conditions, namely, (a) he is a citizen of Bangladesh; (b) he has completed the age of twenty-one years; (c) he has obtained a degree in law from any University of Bangladesh or a Bachelor degree in law from any University outside Bangladesh recognised by the Bar Council or he is a Barrister; (d) he has passed such examinations as may be prescribed by the Bar Council; and (e) he has paid such enrolment fee and fulfils such other conditions as may be specified.[2]

Before a person is admitted as an advocate, the Bar Council may require him to undergo regular training for a continuous period of six months as a pupil in the chamber of an advocate of 7 years' experience.[3] Every applicant for admission as an advocate shall have to pass a written examination and *viva* voce examination held under the direction and supervision of the Bar Council.[4] A person who has obtained LL.M. degree shall not be required to appear in the written examination but shall be required to appear in the *viva voce* examination.[5] No person shall practise as an advocate unless he is a member of a local Bar Association which is recognised by the Bar Council.

No advocate shall be permitted to practise before the High Court Division of the Supreme Court unless -- (a) he has practised as an advocate before the subordinate courts in Bangladesh for a period of two years; (b) he is a law graduate and has practised as an advocate before any High Court outside Bangladesh; (c) he has, for reason of his legal training or experience, been exempted by the Bar Council from the foregoing requirements; and (d) he has paid prescribed fees.[6]

Besides practicising in the different courts, the advocates are entitled to be legal advisers, legal consultants in different organisations. Some of them become public prosecutors to act on behalf of the Government when the Government is a party to suit. Some of the advocates become notary public for certifying deeds or other documents on behalf of the Government.

3. BANGLADESH BAR COUNCIL

In accordance with the provisions of the Bangladesh Legal Practitioners and Bar Council Order, 1972, the Bangladesh Bar Council, the term of which is three years, consists of fifteen members of whom -- one is the Attorney General for Bangladesh, *ex officio*; seven are elected by the advocates on the roll from amongst their members; and seven are elected by the advocates on the roll from seven groups of Bar Associations.[7] The Atterney-General for Bangladesh shall be the Chairman *ex officio* of the Bar Council.[8] The Vice Chairman of the Bar Council shall be elected by the members of the Council from amongst themselves.[9]

The functions of the Bar Council *inter alia* are—to admit persons as advocates on its roll, to hold examinations for purposes of admission, and to remove advocates from such roll; to prepare and maintain such roll; to lay down standard of professional conduct and etiquette for advocates; to entertain and determine cases of misconduct against advocates on its roll and to order punishment in such cases; to promote legal education and to lay down the standards of such education in consultation with the Universities in Bangladesh imparting education.[10] The Bar Council constitutes the following standing committees : the executive committee; the enrolment committee; the finance committee; and the legal education committee.[11]

4. BAR ASSOCIATIONS

In Bangladesh there are several Bar Associations, some of them are recognised by the Bangladesh Bar Council and some of them are not recognised. At the apex remains the Federation of the Bar Associations. The Supreme Court Bar Association is the most important Bar Association in Bangladesh which has a historic role to play in maintaining and upholding independence of judiciary and the practising lawyers. This Bar Association consists of the advocates who parctise law in the High Court Division, as well as well as in the Appellate Division of the Supreme Court of Bangladesh.

Next to the Supreme Court Bar Association the District Bar Association, situated at the headquarters of each district consisting of the local practitioners, is an important Bar Association which is recognised by the Bangladesh Bar Council. Recently a *Upazilla* Bar Association has been formed by the local practitioners at the headquarters of each *upazilla*.

In this connection it should be noted that any Association of advocates ordinarily practising at a place may apply to the Bar Council for recognition as a Bar Association.[12] The application shall be filed by the President or Secretary of the Association and the Bar Council shall decide the application for recognition of a Bar Association within four months of the submission of the applicaiton in this behalf.[13]

5. LAW FIRMS

In Bangladesh there are some law firms most of which are located in Dhaka. In most cases they are not registered, so they are not partnership firms within the meaning of the partnership Act, 1932. They are not to be used in the western sense. In these law firms some junior or less prominent lawyers are associated with a prominent lawyer to give a collaborative advice to their clients or to plead the cases of their clients jointly.

Among the famous law firms the following may be mentioned : (a) Kamal Hossain and Associates led by Dr. Kamal Hossain, a former Foreign Minister of Bangladesh; (b) Huq and Company led by Barrister Rifique-ul Huq; (c) Chancery Chambers led by Barrister Nazmul Huda; (d) House of Law led by Barrister Mozammel Huq Bhuiya and Barrister Rabeya Bhuiya; (e) Law Center led by Barrister Moinur Reza Chowdhury; (f) Law Associates led by Barrister Aminul Islam;

(g) B. Ahmed and Company led by Mr. B. Ahmed: (h) Orr Dignam and Company led by Mr. Hafizullah; (i) T. Rahman and Company led by Barrister Tufailur Rahman: (j) Chamber of Law led by Khondker Mahbub Hossain; (k) Shafique and Company led by Barrister Shafique Ahmed.

It should be noted in this connection that most of the prominent lawyers of the Supreme Court of Bangladesh were educated in London where they completed the course of Barrister-at-law and become well-versed in the common law system which has a profound influence in the legal system of Bangladesh.

6. LEGAL ORGANISATIONS

In Bangladesh there are many legal organisations, almost all of which are situated in Dhaka, Capital of Bangladesh. Some of these legal organisations donot bear any significance. Only a few number of organisations are active in implementing the aims and objectives for which they were established. Bangladesh Institute of Law and International Affairs, Institute of Human Rights and Legal Affairs, Society for the Enforcement of Human Rights, Institule of Democratic Rights, Humanist and Ethical Association of Bangladesh which have more or less the common aims and objects: (a) to undertake, study and research of the existing laws of Bangladesh; (b) to uphold the rule of law and the sanctity and inviolability of the Constitution of the country; (c) to uphold and protect the independence of judiciary and the independence of judges; (d) to uphold human rights and furdamental freedoms and to create awareness and make people conscience of their basic legal and human rights by holding seminars, symposiums and through write-up in the newspapers and magazines; (e) to render legal aid and assistance to person or persons in his or their struggle against all forms of oppression, discrimination and unjust laws.

There are some technical differences between these organisations. Bangladesh Institute of law and International Affairs is a semi-governmental organisation engaged mainly in publishing law books and journals, sponsoring research projects and organising seminars and symposiums. Institute of Human Rights and Legal Affairs is an independent self-financed non-governmental organisation which is affiliated to the International Commission of Jurists, Geneva, Switzerland. In the recent years this Institute has earned international reputation in upholding the rule of law, independence of judiciary and fundamental human rights. Society for the Enforcement of Human Rights has earned its reputation by giveing legal aids to the poor people in upholding their legal and human rights. Institute of Democratic Rights is engaged in translating statutes and organising training programmes for the apprentice-lawyers. The Humanist and Ethical Association of Bangladesh is affiliated to the International Humanist and Ethical Union, Utrecht, the Netherlands. It has been working for the establishment of rule of law, independence of judicialy and enforcement of human rights and fundamental freedoms.

7. REPORTING COURT DECISIONS

Under the Muhammadan system of law there was no doctrine of judicial precedent; the texts of the jurists remained the abiding source of the rule of law. Since the enactment of the Law Reports Act, 1875 (Act XVIII of 1875). official reports of the decisions of the superior courts have been regularly being published with the result that the rule governing a case is now deduced less from the text of a joint or a section of a stuatute than from the interpretation put upon it in a binding reported decision. The Law Reports Act, 1875, did not apply to the decisions of the Privy Council and the Federal Court. But the Privy Council Reports published by the Incorporated Society of Law Reporting of England and Wales, and the Federal Court Reports and the Supreme Court Reports published under the authority of those Courts have been made available to the subordinate courts. Reports of High Court decisions were published under the authority of the statute, the editor being a practising lawyer, assisted by a committee selected from the Bench and Bar; of necessity the selection of cases for publication depends upon their judgment.

There are also unofficial reports which include judgments not printed in the authorised reports. The Law Reports Act, 1875, lays down that no court shall be bound to follow a decision in an unofficial report but in practice it will normally do so, unless it conflicts with a binding decision in an official reports.[14]

During the British regime, there were a number of unofficial reports which earned reputation. Among these Indian Appeal (I.A.) popularly known as Moore's Indian Appeal (M.I.A); the Indian Law Reports (I.L.R.); the All Indian Reportors (A.I.R.); the Bengal Law Reports (B.L.R.); the Indian Cases (I.C.) ; the Calcutta Law Journal (C.L.J.); the Calcutta Law Reports (C.L.R.); the Calcutta Weekly Notes (C.W.N.) were important. Some of them are still being published. After the creation of Pakistan some new law journals began to be published, such as the All Pakistan Legal Decisions (P.L.D.); the Pakistan Law Reports (P.L.R.); the Dhaka Law Reports (D.L.R.). the All Pakistan Legal Decisions and the Dhaka Law Reports are still being published from Lahore and Dhaka respectively. After the emergence of Bangladesh some new journals have began to be published such as the Bangladesh legal Decisions (B.L.D.); the Bangladesh Supreme Court Reports (B.S.C.R.); the Bangladesh Case Reports (B.C.R.). But there is a gradual degradation of the standards of these journals which is remarkably evidenced.

NOTES AND REFERENCES

1. Article 19(1) of the Legal Practitioners and Bar Council Order, 1972.
2. Article 27(1), *ibid*
3. Article 27(2), *ibid*.
3. Article 27(2), and rule 60(1) of the Bangladesh legal Practitioners and Bar Council Rules, 1972.
4. Rule 60A, *ibid*.
5. Rule. 60C, *ibid*.
6. Articles (1), 21(2) and 22(1) of the Bangladesh Legal Practitioners and Bar Council Order, 1972.
7. Section 3(2), *ibid*.
8. Section 6(2), *ibid*.
9. Section 6(3), *ibid*.
10. Section 10, *ibid*.
11. Section 11, *ibid*.
12. Article 67(1), *ibid*.
13. Article 67(3), *ibid*.
14. Section 4 of the Law Reports Act, 1875.

CHAPTER X

RECENT LEGAL DEVELOPMENTS

1. LAW RELATING TO OMBUDSMAN

In the recent years some developments take place in the legal system of Bangladesh. One of these developments is the establishment of the office of the Ombudsman under the Ombudsman Act, 1980 (Act XV of 1980), which was promulgated in conformity with the provision of Article 77 of the Constitution of Bangladesh, 1972. The Ombudsman Act, 1980, provides that there shall be an Ombudsman who shall be appointed by the President on the recommendation of Parliament.[1] Parliament shall recommend for appointment as Ombudsman a person of known legal and adminsitrative ability and conspicuous integrity.[2]

The Ombudsman may investigate any action taken by a Ministry, a statutory public authority, or a public officer in any case where -- (1) a complaint in respect of such action is made to him by a parson— (a) who claims to have sustained injustice in consequence of such action; or (b) who affirms that such action has resulted in favour being unduly shown to any person or in accrual of undue personal benefit or gain to any person; (2) information has been received by him from any person or source, otherwise than on a complaint, that such action is of the nature mentioned above.[3]

If, after investigation of an action under this Act, it appears to the Ombudsman that injustice has been caused to the complainant or to any other persons in consequence of maladministration in connection with such action, the Ombudsman shall, by a report in writing, recommend to the competent authority concerned that such injustice should be remedied in such manner and within such time as may be specified in the report.[4]

2. LAW RELATING TO AMINISTRATIVE TRIBUNAL

The Law relating to Adminsitrative Tribunal has been contained in the Administrative Tribunals Act, 1980(Act VII of 1981), which was promulgated in conformity with Article 117 of the Constitution of Bangladesh, 1972. An Administrative Tribunal, established by the Government, consists of one member who shall be appointed by the Government from among persons who are or have been District Judges.[5] An Administrative Tribunal shall have exclusive jurisdiction to hear and determine applications made by a person in the service of the Republic in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic.[6]

An Administrative Appellate Tribunal, established by the Government, consists of one member who shall be appointed by the Government from amongst persons who are or have been or are qualified to be Judges of the Supreme Court of Bangladesh.[7] The Administrative Appellate Tribunal shall have jurisdiction to hear and determine appeals from any order or decision of an

Adminsitrative Tribunal and the decision of the Adminsitrative Appellate Tribunal in an appeal shall be final.[8]

All decistions and orders of the Administrative Appellate Tribunal shall be binding upon the Administrative Tribunals and the parties concerned.[9] All decisions and orders of the Administrative Tribunal shall, subject to the Adminsitrative Appellate Tribunal, be binding on the parties concerned.[10] No proceedings, order, decision of a Tribunal shall be liable to be challenged, reviewed, quashed or called in question in any court.[11]

3. LAW RELATING TO REORGANISATION OF ADMINISTRATION AND JUDICIARY

The Government that was established after the Proclamation of Martial Law on the 24th March, 1982, decided to reorganise the administration at the *upazilla* level. Under this reorganised set-up each *upazilla* will be the focal point of all administrative activities. With these ends in view the Local Government (*Upazilla Parishad* and *Upazilla* Administration Reorganisation) Ordinance, 1982 (Ordinace LIX of 1982), was promulgated. Under the Ordinance there shall be constituted a Parishad at every *upazilla* to be called *Upazilla* Parishad.[12] A *Upazilla* Parishad consists of Chairman, representative members, three women members, official memebers, Chairman of the *Upazilla* Central Co-operative Association, and one nominated member.[13]

The Chairman shall be elected for five years by direct election on the basis of adult franchise.[14] The executive power of a *Parishad* vests in, and is exercised by, the Chairman either directly or through the *Upazilla Nirbahi* Officer (U.N.O.) or any other officer or person authorised by him.[15] The Chariman has the supervision and control over the functions of all the officers of the *Upazilla* Parishad save the trying Magistrate and the Assistant Judge formorly known as *Munsif*.

Besides this sort of reorganisation of the adminsitration and judiciary, the Government had established outside Dhaka more Benches of the High Court Division of the Supreme Court under the provisions of Article 100 of the Constitution of Bangladesh, 1972. This has created resentment among the lawyers and jurists who led movement against the Government for the withdrawal of these Benches. Ultimately in pursuance of the decision of the Appellate Division of the Supreme Court of Bangladesh all these Benches have been again abolished. [16]

4. INCOME TAX LAW

In 1984 the Income Tax Ordinance, 1984 (Ordinance XXXV of 1984), has been promulgated which in effect repealed the Income Tax Act, 1922 (Act XI of 1922). The main object of the Income Tax Ordinance, 1984, is to tax income of an assessee for a given year. Special procedure is followed for the calculation and assessment of incometax. Where an Act of Parliament provides that incometax shall be charged for any assessment year at any rate or rates, incometax at that rate or those rates shall, subject to the provisions of that Act, be charged, levied, paid and collected in accordance with the provisions of this Ordinance in respect of the total income of the income year or income years, as the case may be, of every person.[17]

For the calculation, assessment and recovery of the income tax from the assessee there shall be the following classes of income tax authorities: (a) the National Board of Revenue; (b) Directors of Inspection and Training (Taxes); (c) Commissions of Taxes; (d) Joint Commissioners of Taxes or Inspecting Joint Commissioners of Taxes; (e) Deputy Commissioners of Taxes: (f) Tax Recovery Officers; (g) Assistant Commissioners of Taxes; (h) Extra Assistant Commissioners of Taxes: and (i) Inspectors of Taxes.[18]

For the purpose of exercising the functions of the Appellate Tribunal under this Ordinance, the Government shall establish a Taxes Appellate Tribunal consisting of a President and such other judicial and accountant members as the Government may. from time to time appoint.[19] An assessee may appeal to the Appellate Tribunal if he is aggrieved by an order of -- (a) an Appellate Joint Commissioner: (b) an Inspecting Joint Commissioner: (c) an Inspecting Joint Commissioner.[20] The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders on the appeal as it thinks fit.[21] The assessee or the Commissioner may within sixty days from the date of receipt of the order of the Appellate Tribunal refer to the High Court Division any question of law arising out of such order.[22] The High Court Division shall, upon hearing the case, decide the question of law and shall deliver judgment thereon.[23] From the judgment of the High Court Division an appeal shall lie to the Appellate Division whose decision shall be final.[24]

5. LAND REFORMS LAW

In 1984 a remarkable change has been brought in the land system of Bangladesh. In that year land Reforms Ordinance. 1984 (Ordinance X of 1984). has been promulgated which *inter* *alia* has imposed reduction in the ceiling of ownership of land. Those who own more than 60 *bighas* of land are debarred from acquiring new agricultural land by transfer, inheritance, gift or any other means.[25] Those owning less than 60 *bighas* of land may acquire new agricultural land by any means provided that the total area owned shall not exceed 60 bighas of land.[26] Acquisition of ownership of land by *benami* transaction is prohibited. [27] In the rural area eviction of the owner from his homestead is prohibited. [28] Rights of the sharecroppers *(bargadars)* are protected and they are entitled to get half of the produce and they are entitled to get one—third of the produce of the land if no capital is invested, if they invest capital they are entitled to another one—third of the produce. They should not be evicted from the land without showing reasonable ground. [29]

In this way, the Land Reforms Ordinance, 1984, has brought some changes in the land system of Bangladesh -- the remarkable one being the protection of the sharecroppers which had not been done before in the history of land reforms of Bangladesh.

6. LAW RELATING TO FAMILY COURT

In 1985 Family Courts Ordinance, (Ordinance XVIII of 1985), has been promulgated with a view to establishing Family Courts. The Court of the Assistant Judge generally situated at *upazilla* will act as the Family Court and the Assistant Judge will be Judge of the said Court.[30] Subject to the provisions of the Muslim Family Laws Ordinance, 1961, the Family Court shall have the jurisdiction to try and dispose of cases relating to -

-- (a) dissolution of marriage; (b) restitution of conjugal right; (c) dower; (d) maintenance; and (e) guardianship and custody of the children.[31] Subject to the exceptions, against the judgment, decree or order of the Family Court appeal may lie to the Court of the District Judge.[32]

These are the legal developments that have taken place in the recent years. These developments do not make any radical change in the country, but they supplement to it some now elements or courts which would be very helpful in running the rule of law as contemplated by the Constitution of the country and as expected by the people of the country.

NOTES AND REFERENCES

1. Section 3(1) of the Ombudsman Act, 1980.
2. Section 3(2), *ibid*.
3. Seciton 6(1), *ibid*.
4. Section 6(1), *ibid*.
5. Sections 3(1), and 3(3) of the Administrative Tribunal Act, 1980.
6. Section 4(1), *ibid*.
7. Section 5(2), *ibid*.
8. Section 6(1) and 6(3), *ibid*.
9. Section 8(1), *ibid*.
10. Section 8(2), *ibid*.
11. Section 10, *ibid*.
12. Section 3(1) of the Local Government (*Upazilla Parishad* and *Upazilla* Administration Reorganisation) Ordinance. 1982.

13. Section 4(1), *ibid.*
14. Section 4(2), *ibid.*
15. Secion 27(2), *ibid.*
16. Constitution 8th Amendment Case Iudgment 1989 B.L.D. (Spt) 1.
17. Section 16 of the Income Tax Ordinance, 1984.
18. Section 3, *ibid.*
19. Section 11(1), *ibid.*
20. Section 158(1), *ibid.*
21. Section 159(1), *ibid.*
22. Section 160(1), *ibid.*
23. Section 161(1) and 161(2), *ibid.*
24. Section 162, *ibid.*
25. Section 4(1) of the Land Reforms Ordinance, 1984.
26. Section 4(2), *ibid.*
27. Section 5, *ibid.*
28. Sections 6 and 7, *ibid.*
29. Section 8-17, *ibid.*
30. Section 4 of the Family Courts Ordinance, 1985.
31. Section 5, *ibid.*
32. Section 17, *ibid.*

APPENDIX-I

THE PROCLAMATION OF INDEPENDENCE 1971

Mujibnagar, Bangladesh
Dated 10th day of April, 1971.

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971, to elect representatives for the purpose of framing a Constitution,

AND

Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution.

AND

Whereas the Assembly so summoned was arbitrarily and illegally postponed for an indefinite period,

AND

Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh. Pakistan authorities declared an unjust and treacherous war.

AND

Whereas in the facts and circumstances of such treacherous conduct Banga Bandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million people of Bangladesh, in due fulfilment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh.

AND

Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh,

AND

Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government.

AND

Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh.

We the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted oruselves into a Constituent Assembly, and

having held mutual consultations, and

in order to ensure for the people of Bangladesh equality, human dignity and social justice,

declare and constitute Bangladesh to be a sovereign People's

Republic and thereby confirm the delaration of independence already made by Banga Bandhu Sheikh Mujibur Rahman and

do hereby affirm and resolve that till such time as a Constitution is framed, Banga Bandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice-President of the Republic, and

that the President shall be the Supreme Commander of all the Armed Forces of the Republic,

shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon,

shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary,

shall have the power to levy taxes and expend monies,

shall have the power to summon and adjourn the Constituent Assembly, and do all other things that may be necessary to give to the people of Bangladesh orderly and just Government.

We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers due to any reason whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilites herein conferred on the President.

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the Charter of the Untied Nations.

We further resolve that this Proclamation of Independence shall be deemed to have come into effect from 26th day of March, 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali our duly constituted potentiary and to give to the President and the Vice-President oaths of offce.

Sd/PFROF. YUSUF ALI

Duly Constituted Potentiary

By and under the authority of the Constituent Asembly of Bangladesh.

APPENDIX II

LAWS CONTINUANCE ENFORCEMENT ORDER 1971

Mujibnagar, Bangladesh

Dated 10th day of April, 1971.

I, Syed Nazrul Islam, the Vice-President and, Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence dated tenth day of April, 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the Proclamation aforesaid ocntinue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangldesh and that all Government officials—civil, Military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service solong enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of allegiance to all government officials within their jurisdiction.

This order shall be deemed to have come into effect from 26th day of March, 1971.

Signed:- SYED NAZRUL ISLAM

Acting President.

APPENDIX III

PROVISIONAL CONSTITUTION OF BANGLADESH ORDER, 1972

[Published in the Bangladesh Gazette, Extra, dated the 11th January, 1972.]

Whereas by the Procamation of Independence Order, dated the 10th April, 1971 provisional arrangements were made for the governance of the People's Republic of Bangladesh;

And Whereas by the said Proclamation the President is invested with all executive and legislative authority and the power to appoint a Prime Minister;

And Whereas the unjust and treacherous war as referred to in the said Proclamation has now ended;

And Whereas it is the manifest aspiration of the people of Bangladesh that a parliamentary democracy shall function in Bangladesh:

And Whereas in pursuance of the said objective it is necessary immediately to make certain provisions in that behalf.

Now Therefore in pursuance of the Proclamation of Independence Order, dated the 10th April, 1971 and all other powers enabling him in that behalf the President is pleased to make and promulgate the following Order:

(I) This Order may be called the Provisional Constitution of Bangladesh Order, 1972.

(2) It extends to the whole of Bangladesh.

(3) It shall come into force at once.

(4) Definition:

"Constituent Assembly" referred to in this Order means the body comprising of the elected repressentatives of the people of Bangladesh returned to the N. E. and P. E. seats in the elections held in December, 1970, January, 1971 and March, 1971 not otherwise disqualifed by or under any law.

(5) There shall be a Cabinet of Ministers, with the Prime Minister at the head.

(6) The President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.

(7) The President shall commission as prime Minister a member of the Constituent Assembly, who commands the confidence of the majority of the members of the Constituent Assembly. All other Ministers, Ministers of State and Deputy Ministers shall be appointed by the President on the advice of the Prime Minister.

(8) In the event of a vacancy occurring in the Office of the President at any time prior to the framing of the Constitution by the Constituent Assembly, the Cabinet shall appoint as President a citizen of Bangladesh who will hold the office of President until another President enters upon the office in accordance with the Constitution as framed by the Constituent Assembly.

(9) There shall be a High Court of Bangladesh, consisting of a Chief Justice and so many other Judges as may be appointed from time to time.

(10) The Chief Justice of the High Court of Bangladesh shall administer an oath of office to the President and the President shall administer an oath of office to the Prime Minister, other Minsiters, Ministers of State and Deputy Ministers. The form of the oath shall be as prescribed by the Cabinet.

Dated this eleventh day of January, One thousand nine hundred and seventy-two, being the twenty-sixth day of Poush, one thousand three hundred and seventy-eight.

APPENDIX-IV

HIGH COURT OF BANLADESH ORDER, 1972

[Published in the Bangladesh Gazette Extra. dated the 17th January, 1972]

President's Order No. 5 of 1972

Whereas it is expedient to provide for the functioning of the High Court of Bangladesh:

Now, Therefore, in pursuance of the Proclamation of Independence of Bangladesh the Provisional Constitution of Bangladesh Order, 1971 and in exercise of all powers enabling him in that behalf, the President is pleased to make the following order:

1. (I) This Order may be called the High Court of Bangladesh Order, 1972.

(2) It extends to the whole of Bangladesh.

(3) It shall come into force at once.

2. The High Court which on the 25th day of March, 1971 was known as the High Court of Judicature at Dacca in East Pakistan (hereinafter referred to as "the High Court at Dacca") shall be deemed to have ceased to exist on the 26th day of March, 1971.

3. The High Court of Bangladesh shall consist of the Chief

Justice and so many other Judges as may be appointed from time to time by the President who shall hold offfice on such terms and conditions as the President may determine.

4. The High Court of Bangladesh shall be a Court of Record, and shall have, in respect of the territories of Bangladesh, all such original, appellate, special, revisional, reviews, procedural and all other powers as were exercisable in respect of the said territories by the High Court at Dacca under any law in force before the 26th day of March, 1971:

Provided that the High Court of Bangladesh shall have no power to issue any writ, order or direction in the nature of *habeas corpus*, *mandamus*, prhibition, *quo warranto* or *certiorari* or any order, direction or declaration, which the High court at Dacca had power to issue under any constitutional provision in force before the 26th day of March, 1971.

5. The High Court of Bangladesh Shall have a seal bearing the monogram of the Government of Bangladesh with a pair of scales superimposed thereon and in the label appearing in the monogram for the words "গণপ্রজাতন্ত্রী বাংলাদেশ সরকার" there shall be substituted the words "বাংলাদেশ হাইকোর্ট"

6. Notwithstanding anything contained in Articie 2 of this Order :

(1) All proceedings which immediately before the commencement of this Order, were pending in the High Court at Dacca shall as from the commencement of this Order, be deemed to be proceedings pending before the High Cfourt of Bangladesh and shall be continued in, heard and determined by, the High Court of Bangladesh as if they had been proceedings instituted in that High Court, and any order made by the High Court at Dacca in any such proceedings shall, for all purposes, have effect as an order made by the High Court of Bangladesh.

(2) Any judgment, decree, order or decision passed, made or

given by the High Court at Dacca before the commencement of this Order shall be enforceable in Bangladesh as if it were a judgement, decree, order, or decision passed, made or given by the High Court of Bangladesh.

7. The High Court of Bangladesh shall have the jurisdiction of review any order made by any Judge of the High Court at Dacca as if the order had been made by a Judge of the High Court of Bangladesh.

8. (I) All rules made by the High Court at Dacca immediately before the commencement of this Order shall subject to this Order continue in force, with necessary modifications, as if they had been made by the High Court of Bangladesh.

(2) All officers and employees who immediately before the commencement of this Order, were serving in the High Court at Dacca shall, as from such commencement be deemed to be persons serving under the High Court of Bangladesh and shall continue to serve the High Court of Bangladesh on such terms and conditions as may be determined by the President.

9. Subject to the provisions of any law on the subject, any person who immediately before the commencement of this Order, was an Advocate entitled to plead or act in the High Court at Dacca shall be deemed to be an Advocate of the High Court of Bangladesh and shall be entitled to plead and act in that High Court.

APPENDIX - V

GLOSARY OF LEGAL TERMS

Adalat	*Adalat* means court established under law.
Benami	***Benami*** means in the name of other person.
Bigha	*Bigha* means 33 decimals of land.
Dayabhaga	Dayabhaga was a commentry on all the Codes of Hindu Law. It was written by Jimutavahana who flourished in about the beginning of the twelfth century.
Diawn	***Diwan*** was the person or company authorise by the Nawabs of Bengal for the collection and administrion.of land revenue.
Hanbali School	*Hanbali* School was founded by Imam Ahmed ibn Hanbal, (780-795 A. D.)
Maliki School	*Maliki* School was founded by Malik ibn Anas (713-795 A. D.)
Mitakshara	*Mitakshara* is the commentary on the Code of *Yajnavalkya* written by Vijnaneswara in the latter part of the eleventh century.

Mofussil	*Mofussil* means town other than Presidency Towns of Calcutta. Bombay or Madras.
Nirbahi	*Nirbahi* means executive.
Panchaet	Panchaet means village arbitration council for the disposal of simple civil and criminal cases.
Parishad	*Parishad* means council.
Shafei School	*Shafei* School was founded by Imam Muhamma ibn Idris ash-Shafei (767-820 A.D.) who was a pupil of Malik ibn Anas.
Shastra	*Shastra* means Hindu religious law or principle.
Shia School	*Shia* School was founded by Imam Jafor as-Sadik an descendant of Hazrat Ali (R.). son-in-law of Prophet Muhammad (Sm.).
Upazilla	*Upazilla* is the lowest administrative unit introduced for the first time in 1982.
Zina	*Zina* meana adultery, incest or fornication.

APPENDIX-VI

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